Supreme Court, U.S.
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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ORYX ENERGY COMPANY,

Petitioner,

v.

YVETTE BOURQUE, WIFE OF AND STEVEN BOURQUE, SAFETY TECHNOLOGY AND OILFIELD PROTECTORS, INC. AND AETNA CASUALTY & SURETY COMPANY,

Respondents.

On Petition for Writ of Certiorari to the Louisiana Court of Appeal, First Circuit

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PETITION FOR WRIT OF CERTIORARI

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208 pp

QUESTIONS PRESENTED

1. Whether the state court of appeal incorrectly decided that state law determined whether an employee covered by the Longshoremen's & Harbor Workers' Compensation Act could recover from the non-negligent charterer of a vessel for personal injuries caused by the charterer's ultrahazardous activity of well testing from a vessel on navigable waters because that activity was not a traditional maritime activity and therefore not within admiralty jurisdiction.

2. Whether the state court of appeal incorrectly decided that state law made void and unenforceable the defense and indemnity provisions of a contract under which the indemnitor leased equipment to the indemnitee that provided

it to a worker covered under the Longshoremen's & Harbor Workers' Compensation Act who was injured on a vessel on navigable waters while engaged in a maritime employment.

PARTIES TO PROCEEDINGS BELOW

Petitioner/Defendant Below

Oryx Energy Company formerly called Sun Exploration and Production Company was incorporated in Delaware in 1971 under the name Sun Oil Company (Delaware) and succeeded to all of the U. S. exploration and production assets of Sun Oil Company which was a New Jersey corporation pursuant to an agreement and plan of reorganization effective September, 1993. Oryx Energy Company's principal place of business is 13155 Noel Road, Dallas, Texas. Oryx Energy Company is in the business of exploring for and producing oil and gas throughout the United States including the inland navigable waters of Louisiana.

Respondents/Plaintiffs, Defendants and Intervenors Below

The respondents are Steven Bourque an employee of Pressure Readout Technology, Inc. and his wife Yvette Bourque both citizens of Louisiana who were plaintiffs below; Aetna Casualty & Surety Company an insurance company that was intervenor below and that paid workman's compensation benefits to Steven Bourque under the United States Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. Sec. 901, et seq., and Safety Technology and Oilfield Protectors, Inc. a Louisiana corporation with its principal place of business in Louisiana.

RULE 29.1 LISTING

ORYX ENERGY COMPANY

ORYX ENERGY COMPANY has no parent companies.

The following are subsidiaries (except wholly owned subsidiaries) (but including all entities in which there is either a direct or indirect ownership interest) of ORYX ENERGY COMPANY:

113857 CANADA LTD.
ANTELOPE INSURANCE CO. LTD.
ORYX AUSTRALIA ENERGY COMPANY PTY. LTD.
ORYX U.K. (INDONESIAN HOLDINGS) LIMITED
ORYX U.K. (KAKAP) LIMITED
ORYX U.K. (MALACCA STRAIT) LIMITED
ORYX U.K. (SOUTHEAST SUMATRA) LIMITED

ORYX (ZOC) ENERGY PTY. LTD.

CANYON REEF CARRIERS, INC.

EAST TEXAS SALT WATER DISPOSAL COMPANY

MESBIC VENTURES, INC.

ORYX CRUDE TRADING & TRANSPORTATION LIMITED PARTNERSHIP

ORYX DEVELOPMENT LIMITED PARTNERSHIP

ORYX GAS MARKETING LIMITED PARTNERSHIP

ORYX PIPE LINT LIMITED PARTNERSHIP

SUN ENERGY PARTNERS, L.P.

SUN OFFSHORE GATHERING LIMITED PARTNERSHIP

SUN OPERATING LIMITED PARTNERSHIP

SUN PENNSYLVANIA LIMITED PARTNERSHIP

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NO. _____

In The

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October Term, 1994

ORYX ENERGY COMPANY,

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V.

YVETTE BOURQUE, WIFE OF AND STEVEN BOURQUE, SAFETY TECHNOLOGY AND OILFIELD PROTECTORS, INC. and AETNA CASUALTY & SURETY COMPANY,

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PETITION FOR WRIT OF CERTIORARI

Oryx Energy Company ("petitioner") respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the Louisiana Court of Appeal, First Circuit, entered on 7 October, 1994 in the matter of "Yvette Bourque, Wife of and Steven Bourque v. Sun Gas Company, Inc. and Safety Technology and Oilfield Protectors, Inc.", Docket Number: 93/CA/2213.

OPINIONS BELOW

The opinion and judgment of the Louisiana Court of Appeal, First Circuit is an unpublished decision (Appendix, pages 58 through 139). The reasons for judgment and judgment of the district court below are also unpublished (Appendix, pages 5 through 51). The denial of Oryx's application for a writ of certiorari and/or review by the Louisiana Supreme Court on 13 January, 1995 is reported at 648 So.2d 1340 (La. 1995) (Appendix, page 140).

JURISDICTION

The judgment of the Louisiana Court of Appeal, First Circuit was entered on 7 October, 1994. A timely application for a writ of certiorari was filed by petitioner with the Louisiana Supreme Court on the 7th day of November, 1994 and the application was denied on 13 January, 1995, 648 So.2d 1340 (La. 1995). Petitioner timely moved for and received an extension of time from this Court within which to file a petition for writ of certiorari up to and including 12 June, 1995. (Application No. A-721), Appendix page 142). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

U.S. Const. art. III, Sec. 2:

"The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."

28 U.S.C. Sec. 1333:

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil cases of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

33 U.S.C. Sec. 902(3):

"The term 'employee' means any person engaged in maritime employment . . .."

33 U.S.C. Sec. 902(21):

"Unless the context requires otherwise, the term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits

under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bareboat charterer, master, officer or crew member."

33 U.S.C. Sec. 905(b) (in pertinent part):

"In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with provisions of Section 933 of this title . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies

against the vessel except remedies available under this chapter."

Louisiana Statutes Annotated:Revised Statutes 9:2780:

'A. The legislature finds that an inequity is foisted on certain contractors and their employees by the defense or indemnity provisions, either or both, contained in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, to the extent those provisions apply to death or bodily injury to persons. It is the intent of the legislature by this Section to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee,

or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee."

"B. Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee."

STATEMENT OF THE CASE

I. Factual Background.

Petitioner owned an oil well on inland navigable waters near Belle Isle, Louisiana. The well became non-producing and petitioner reworked the well in late 1986 or early 1987. Petitioner then hired Pressure Readout Technology, Inc. ("Protech") to provide well testers and equipment to determine the rate of production of the well, i.e., to do a "well test". The well consisted of a Christmas tree with cribbing and there was no place for any of the test equipment on the well. Therefore, petitioner chartered two (2) barges from which to conduct the well test. The barges were towed to the location, moored next to the well and a pipe was installed to connect the well to a tank on one of the barges.

The well test was conducted in three days and at the conclusion the pipe was disconnected and the barges towed off the location.

Respondent Steven Bourque was a well tester employed by Protech for this job. He worked only on the barges and periodically recorded the rate of flow from the well by measuring the contents of the tank.

Because the well had a history of producing hydrogen sulfide, a deadly organic gas, petitioner leased from respondent Safety Technology and Oilfield Protectors, Inc. ("Stop") self-contained breathing apparatus ("SCBA") which would allow workers to work safely even when exposed to high levels of H2S. Stop also provided and installed on the barges safety equipment such as monitors and

alarms to detect and warn of the presence of ambient hydrogen sulfide if it reached potentially toxic levels. The lease agreement between petitioner and Stop contained an indemnity clause in favor of petitioner.

On 9 February, 1987, Bourque and a co-employee were on petitioner's barges conducting the well test and measuring the contents of the tanks. Bourque was exposed to H2S during the well test on a barge. As a result he sustained a post traumatic stress disorder.

II. Proceedings Below.

Bourque and his wife commenced a state court suit against petitioner on the grounds it was negligent and strictly liable under Louisiana law because it was engaged in well testing in the presence of

a toxic gas which was an ultrahazardous activity. They also claimed Stop was negligent for having furnished a defective SCBA.

Petitioner denied liability and by an amended answer filed on September 21, 1988[1/], it affirmatively pleaded that Bourque was covered by the Longshoremen's & Harbor Workers' Compensation Act, that it (petitioner) was the charterer of the vessel and under 33 U.S.C. Sec. 905(b) it could not be held strictly liable because 905(b) does not permit recovery except where the vessel's charterer has been negligent. Petitioner filed a cross-claim seeking contractual defense and indemnity from Stop. Stop denied liability on the

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1/ Appendix, Pages 1 thru 4.

cross-claim on the basis the defense and indemnity provisions were void and unenforceable under the Louisiana Oilfield Anti-Indemnity Act (LSA:R.S.9:2780). No responsive pleading was filed by petitioner to Stop's defense under state law that the Louisiana Anti-Indemnity Act applied, but it has maintained in all inferior courts that the anti-indemnity act did not apply because the contract was maritime in nature.

Aetna Casualty & Surety Company ("Aetna") intervened to assert subrogation rights as the workmen's compensation carrier of Protech for benefits provided to Bourque under the United States Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. Sec. 901, et seq.

The state district court after trial on the merits held in an unpublished opinion that none of the claims and defenses were within admiralty jurisdiction which precluded application of 33 U.S.C. Sec. 905(b). Therefore, it applied Louisiana state law to all claims. The district court found that neither petitioner nor Stop were negligent but that petitioner was strictly liable under Louisiana law because it was engaged in an ultrahazardous activity. The district court held that state law was applicable and there was no admiralty jurisdiction because the relevant activity was "well testing". The fact petitioner was conducting the well test from barges was not sufficient to imbue the case with a maritime flavor and bring it within the scope of admiralty jurisdiction.

Likewise, the district court held that petitioner was not entitled to defense and indemnity from Stop because the contract was subject to the Louisiana Oilfield Anti-Indemnity Act, LSA:R.S. 9:2780.

The district court rejected petitioner's claims that the contract was enforceable under maritime law on the grounds that there was no maritime jurisdiction because the relevant activity was a well test.[2/]

The district court found that Bourque was guilty of substandard conduct in the amount of 20%. The district court awarded damages to Bourque and his wife but reduced the award by the amount of Bourque's own negligence. The district

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2/ Appendix, Page 15.

court despite finding that Bourque was paid benefits under the Longshoremen's & Harbor Workers' Compensation Act reduced Aetna's award by the amount of Bourque's negligence pursuant to Louisiana state law.

An appeal was taken by petitioner to the Louisiana Court of Appeal, First Circuit. In an unpublished opinion, the court of appeal ruled on the 7th of October, 1994 that the district court judgment was correct. The court of appeal rejected petitioner's argument that because the activity which resulted in injury to a worker covered under the United States Longshoremen's & Harbor Workers' Compensation Act occurred on a vessel on navigable waters that petitioner could not be liable on the basis of strict or absolute liability because it was "the

vessel".[3] Likewise, the court of appeal rejected petitioner's argument that because Stop provided safety equipment used by a worker covered under the United States Longshoremen's & Harbor Workers' Compensation Act on a vessel on navigable waters, the contract was subject to maritime law and not the Louisiana Oilfield Anti-Indemnity Act. The court of appeal commented that the plaintiff was a covered worker under the Longshoremen's & Harbor Workers' Compensation Act and intimated that the district court was wrong to reduce Aetna's recovery by the amount of Bourque's negligence but that Aetna could nor assert this error because it had failed to appeal.[4]

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[3] Appendix, Pages 80-81.

[4] Appendix, Pages 138-139.

The district court's ruling while recognizing that the incident occurred on a vessel on navigable waters held the case was not within admiralty jurisdiction because "... the 'well testing' process was not performed in a manner different from the way such testing would occur of (sic) a land based well. The only difference, according to the testimony presented, would be the fact that the equipment could be spread over a wider area. The essential nature of the activity is unchanged by its maritime locale. . . .[T]he relevant activity, well testing, . . ., is an activity related to the exploration for and production of oil and gas. It is not 'traditional maritime

activity'".[5] The court of appeal not only accepted the district court's rationale but added the gloss that "... the mere use of barges, which, although typically used for maritime purposes, were used as platforms for the well testing equipment in this case, does not magically convert the activity of well testing into one with a substantial relationship to (a) traditional maritime activity."[6]

The Louisiana Supreme Court refused to review the case on petitioner's application for certiorari. Petitioner then satisfied the judgment but expressly reserved the right to seek reimbursement

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5/ Appendix, Page 14.

6/ Appendix, Pages 81-82.

if certiorari were granted by this Court and the court of appeal's decision reversed.

REASONS FOR GRANTING THE PETITION

Petitioner seeks a review by this Court because the decision of the court of appeal, although predating, is in conflict with the decision of this Court in Grubart v. Great Lakes Dredge & Dock Co., ___ U.S. ___, 115 S.Ct. 1043, ___ L.Ed.2d ___ (1995). The decision of the court of appeal also conflicts with the holding in Sisson v. Ruby, 497 U.S. 358, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990).

Even though the test for admiralty jurisdiction was very recently considered by this Court in February of 1995 in Grubart and certiorari has been granted in Yamaha Motor Corporation v. Calhoun, ___ U.S. ___, 115 S.Ct. ___, ___ L.Ed.2d ___ (1995) (No. 94-1387) on a closely allied issue - the application of state law in cases of maritime jurisdiction - there

does exist a need for a clearer and brighter line to determine admiralty jurisdiction. One view of the decision of the lower courts in this case is that they correctly enunciated the elements of the test but reached the wrong result. Under this view, while the decision of the court of appeal would be wrong, this case might not represent the type of case in which certiorari would be granted. However, the fact that the court of appeal could reach the result that it did highlights the highly subjective nature of the present test Grubart notwithstanding.

The present admiralty jurisdiction test has produced holdings that a passenger in a helicopter injured in an emergency helicopter landing on the high seas has a claim within maritime

jurisdiction[7/] but a worker covered under the Longshoremen's & Harbor Workers' Compensation Act engaged in maritime employment injured on a vessel on navigable waters has only a state claim. Such a test probably should be abandoned in favor of a test under which all shipboard accidents on navigable waters are within admiralty jurisdiction and only off-vessel accidents must satisfy a maritime nexus requirement.

Litigants in inferior courts would benefit from a brighter, clearer test which will save litigants expense and conserve valuable judicial resources. (Grubart, dissent of Justice Thomas ___ U.S. ___, 115 S.Ct. at p. 1056). Such a

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7/ Green v. Industrial Helicopters, Inc., 593 So.2d 634, 636-37 (La. 1992).

test was in place prior to Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). Under that test if the injury occurred on navigable waters, admiralty tort jurisdiction was deemed to exist per se. The pre Executive Jet jurisprudence was clear and easy to apply. The present test, as defined in Grubart, is still subjective and therefore results will continue to be difficult to predict.

Maritime contract jurisdiction has not received the same recent attention in this Court as admiralty tort jurisdiction. The courts below applied the decisions of the United States Court of Appeal for the Fifth Circuit to hold that petitioner's claims against Stop for contractual defense and indemnification were subject to state law. The court of appeal "borrowed" from Executive Jet the locality

plus nexus" test enunciated for maritime tort jurisdiction to decide maritime contract jurisdiction. Again, the court of appeal defined the relevant activity as well testing which demonstrates that the test means different things to different people. Bourque was engaged in well testing. However, the equipment furnished by Stop was safety equipment intended for the use and protection of a worker covered by the Longshoremen's & Harbor Workers' Compensation Act engaged in a maritime employment on a vessel. Stop did not furnish the equipment used for the well test. It furnished equipment which was used on a vessel on navigable waters which enabled that vessel to perform its intended function. The well test features of this case were not relevant to

Stop.[8/]

8/ The Louisiana Oilfield Anti-Indemnity Act, LSA:R.S. 9:2780 would not preclude indemnity if petitioner is free of fault. This would be the case if 33 U.S.C. Sec. 905(b) is controlling because petitioner was found not to be negligent and ultrahazardous activity should not be a recognizable cause of action against a vessel. Hess v. Upper Mississippi Towing Corp., 559 F.2d 1030 (5th Cir. 1977), rehearing denied 564 F.2d 97, cert. denied 435 U.S. 924, 98 S.Ct. 1489, 55 L.Ed. 518. Therefore, any holding which in effect relieves petitioner of fault would probably moot the admiralty contract jurisdiction aspects of the case because petitioner then would be entitled to indemnity from Stop even if the Louisiana Oilfield Anti-Indemnity Act applies. See Meloy v. Conoco, 504 So.2d 833 (La. 1987).

The decision of the court of appeal was erroneous in allowing recovery for strict liability because if it had held that admiralty jurisdiction existed, it would have been required to hold that 33 U.S.C. Sec. 905(b) controlled Bourque's right of recovery against petitioner. One of the changes wrought by the 1972 amendments to the Longshoremen's & Harbor Workers' Compensation Act was 905(b) which "... restricted his (the injured employee) recovery from the shipowner to negligence." Hess v. Upper Mississippi Towing Corp., supra, 559 F.2d 1030 at 1032. Thus, the jurisdictional issue was paramount - if state law applied, Bourque had a claim for strict liability; if

admiralty law applied, he did not.[9/] State law was applied because the court of appeal erroneously concluded there was no admiralty jurisdiction.

The savings to suitors clause allows cases within the admiralty jurisdiction to be brought in state courts. However, "the 'savings to suitors' clause allows state courts to entertain in personam maritime causes of action, but in such cases the extent to which state law may be used to

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9/ Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 106 U.S.2485, 91 L.Ed.2d 207 (1986) holds that state law cannot "supplement" federal maritime law where Congress has pre-empted the field with a statute which is applicable. 905(b) is such a statute and it pre-empts state theories of strict liability. Hess, supra.

remedy maritime injuries is constrained by a so-called 'reverse-Erie' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards." Offshore Logistics, Inv. v. Tallentire, supra, 477 U.S. at 222-223, 106 S.Ct. at 2494.

This case is important because state courts would benefit from a clear bright line test for admiralty jurisdiction and an admonition that the uniformity requirements of that law may not be circumvented by jurisdictional means. Or, stated another way, state courts would benefit if the jurisdictional test was easier to apply and the room to stray eliminated. A clear bright line test like the locality rule, stripped of the nexus

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This case is important because state courts would benefit from a clear bright line test for admiralty jurisdiction and an admonition that the uniformity requirements of that law may not be circumvented by jurisdictional means. Or, stated another way, state courts would benefit if the jurisdictional test was easier to apply and the room to stray eliminated. A clear bright line test like the locality rule, stripped of the nexus

requirment save in non vessel related incidents, would enable inferior courts to see clearly the path that leads to the application of the correct law (federal maritime law) when a putative tort occurs on a vessel on navigable waters.

I. THE DECISION OF THE STATE COURT OF APPEAL IS IN CONFLICT WITH THE HOLDINGS OF THIS COURT.

This Court recently wrote at length about admiralty jurisdiction. Grubart traced its evolution from the time when locality alone ruled the day, to the departure from the strict locality rule in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972) which added a "nexus" requirement and the cases of Foremost Ins. Co. v. Richardson, 457 U.S. 668, 102 S.Ct.

2654, 73 L.Ed.2d 300 (1982) and Sisson v. Ruby, 497 U.S. 358, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990) which explained and refined the nexus requirements. The nexus test as applied in Grubart is two pronged, "whether the incident involved was of the sort with the potential to disrupt maritime commerce" ___ U.S. ___, 115 S.Ct. at 1050, and "whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity", ___ U.S. ___, 115 S.Ct. at 1051.

There never has been any issue that the locality aspect of admiralty jurisdiction, tort or contract, is met in this case. All the activities pertinent to the case occurred on vessels on navigable waters. The deciding factor for the

application of state law by the lower courts was the nexus requirement, the fact that the activity in question as defined, well testing, did not relate to a traditional maritime activity. The court of appeal did not differentiate principles between admiralty tort and contract jurisdiction when considering jurisdiction. It felt for either the determining factor was that the relevant activity was a well test and not that petitioner was conducting this activity from vessels on navigable waters. The state court of appeal determined the "relevant activity" to be the purpose for which the activity was conducted and not in terms of how the activity was performed. In so doing, the court of appeal failed to follow the prior holding of this Court in Sisson. It also reached a result which is contrary to Grubart

although it had not yet been decided when the state court of appeal ruled. The error of the court of appeal lay in its neglect of the consideration of the "maritime connection enquiries", Grubart, ___ U.S. ___, 115 S.Ct. at 1050. The court of appeal did little more than engage in a syllogism - well testing is done on land, when it is done on water it is done the same way as on land, therefore well testing on water is a land activity. Thus, the court of appeal failed to consider the first factor set forth in Sisson and Grubart and misunderstood the second.

Similar to the City of Chicago's argument in Grubart that the relevant activity was the maintaining and operation of a tunnel, ___ U.S. ___, 115 S.Ct. at 1052, the court of appeal in this case

looked to the broader purpose and failed to consider that petitioner chartered the barges and utilized them on navigable waters as storage for a petroleum product. The court of appeal violated (unknowingly of course) the admonition of Grubart against "hyper generalization", ___ U.S. ___, 114 S.Ct. at 1052.

The decision of the court of appeal here is an excellent example of the possibility of "whimsy" mentioned in Grubart, ___ U.S. ___, 115 S.Ct. 1052. But, to play the devil's advocate, the whimsy resulted not from capriciousness but because of the highly subjective nature of the test - a subjectivity which although lessened by Grubart, does still exist. The court of appeal here was able to find no admiralty jurisdiction because it ignored the maritime aspects of

petitioner's activities. "The test turns on the comparison of traditional maritime activity to the arguably maritime character of the tortfeasor's activity in a given case; the comparison would merely be frustrated by eliminating the maritime aspects of the tortfeasor's activity from consideration." ___ U.S. ___, 115 S.Ct. at 1052.

Petitioner utilized vessels to perform the well test. The well test was done on navigable waters. The potential for the disruption of maritime commerce as a result of petitioner's activities was not theoretical, it was palpable and real. The character of the activity of petitioner at the appropriate level of generalization (not too high and not too low) was the use of a vessel to store and measure a liquid product which is closely

akin to the very traditional activity of using vessels to store and transport cargo. The court of appeal ignored these aspects of petitioner's activity and in so doing, reached a decision which directly conflicts with Grubart.

The case for admiralty contract jurisdiction is stronger. Stop was not involved in the well test. Its contract was to furnish and install equipment on the vessels for the purpose of allowing a worker covered by the Longshoremen's & Harbor Workers' Compensation Act to work safely on navigable waters. "The only general rule is that to be a maritime contract, the subject matter of the contract must be directly and intimately related to the operation of a vessel and navigation ...". Vol. 1 Schoenbaum,

Admiralty and Maritime Law, 2dEd., Section 3-10, p. 111.

The same admonition against hyper-generalization in tort cases a la Grubart should apply in contract cases. Petitioner leased the equipment from Stop for use on a vessel in order to render the vessel a safe place to work for a maritime worker. Therefore, the contract was within maritime jurisdiction.

II. THE DECISION OF THE STATE COURT OF APPEAL IS ERRONEOUS.

The error of the state court of appeal was in failing to use the proper methodology as required by Grubart which entailed consideration of the putative tortfeasor's maritime activities. This Court implied in Grubart that ordinarily a

putative tort involving a vessel will fall within admiralty jurisdiction, ___ U.S. ___, 115 S.Ct. at 1052. The grounds enunciated by the state court of appeal for rejecting admiralty jurisdiction here fail to show an adequate basis for not following the general rule.

The court of appeal dismissed petitioner's vessel related activities on the basis the vessels were used as "platforms". (Appendix Page 82). The similar situation existed in Grubart except there the vessel was "fastened to the river bottom" and here they were moored. In any event, Grubart established that even if the vessels were "work platforms" they retained the status of "vessels" for admiralty tort purposes. Grubart, supra, ___ U.S. ___, 115 S.Ct. 1049. Thus, the state court of appeal was

wrong to conclude that state law applied on such a basis.

Petitioner was the "vessel" because it was the charterer. 33 U.S.C. Sec. 902(2). 33 U.S.C. Sec. 905(b) allows recovery from a vessel only where it has been negligent. The term "negligence" is a term connoting a limitation and by history, an abnegation of any right of recovery based on a theory of strict liability. Hess v. Upper Mississippi Towing Corp., supra. Had the lower court held admiralty tort jurisdiction existed, it should then have held that ultra-hazardous activity was not a basis for recovery under 905(b) and that state law

was pre-empted by 905(b).[10/] See Offshore Logistics, Inc. v. Tallentire, supra, for discussion of pre-emption. Therefore, the decision of the state court of appeal was erroneous and the error was not harmless.

As previously stated, if Bourque's judgment against petitioner is reversed, the contract issues may be moot because

---

10/ 33 U.S.C. Sec. 905(b) is not jurisdictional. It only applies if the underlying claim is within admiralty jurisdiction. Richendollar v. Diamond M Drilling Co., Inc., 784 F.2d 580 (5th Cir. 1986), on rehearing 819 F.2d 124, cert. denied 484 U.S. 944, 108 S.Ct. 331, 98 L.Ed.2d 358, rehearing denied 484 U.S. 1021, 108 S.Ct. 736, 98 L.Ed.2d 684.

even under state law, petitioner would prevail against Stop and recover its cost of defense. Meloy v. Conoco, Inc., supra. If not, the admiralty contract issues remain and so does the question of whether the fact that petitioner's activity was well testing is alone enough to defeat such jurisdiction.

One thing is clear, while Bourque may have been involved in the well test, Stop was not. Its equipment was not used to test the well. Its equipment was used to make the vessels a safe place to work.

"[T]he basic rationale for federal admiralty jurisdiction is 'protection of maritime commerce through uniform rules of decision'...", Grubart, ___ U.S. ___, 115 S.Ct. 1053. "[T]he maritime law ... ordinarly treats an 'appurtenance'

attached to a vessel in navigable waters as part of the vessel itself." Grubart, ___ U.S. ___, 115 S.Ct. at 1049. Stop attached some of its equipment to the vessels to detect H2S. It leased SCBA's for personnel use on the vessels. SCBA's are analytically similar to life preservers. Why the fact that petitioner was engaged in a well test is relevant to its contract with Stop is largely unexplained. The barges could have been moored nearby the well engaged in some purely maritime activity and because of the H2S hazard, personnel would have been required to wear SCBA's and the vessels would have been equipped with H2S monitors. For contract purposes, Oryx's activity was not well testing - it was the equipping of a vessel to allow it to safely perform its mission. The court of appeal by "hyper-generalization" defined

the different aspects of this case so broadly as to bring different actors in different capacities under one rubic - "well test". It was error to hold the contract under which the equipment used on the vessel for non well test purposes was not a maritime contract.

III. THE QUESTIONS ARE IMPORTANT.

Since the ink is barely dry on Grubart, the question naturally presents itself as to why another maritime jurisdiction case should be considered at this time. The answer is twofold: (1) an apparent increasing number of admiralty cases are being filed in state court under the savings to suitors clause and these courts would benefit from a completely objective tort jurisdictional test, and

(2) Grubart did not address admiralty contract jurisdiction.

A review of the West digest system shows over the past ten or fifteen years, state courts are more and more hearing cases in which admiralty issues are implicated. State district courts, unlike federal district courts, have general jurisdiction. The case load of a state court may number in the thousands. With more cases and sometimes less resources, state courts would benefit from a clear bright line test such as all shipboard accidents on navigable waters are within admiralty tort jurisdiction per se and the nexus requirement need only be considered in off-ship incidents such as aircraft crashes.

The need to select the appropriate level of generalization with a focus on the putative tortfeasors' vessel related activities may be something which "admiralty lawyers understand reasonably well", Grubart, 115 S.Ct. at 1055. This case shows the difficulty state courts have with the issue. The district judge in this case was a Louisiana State University Law School professor sitting ad hoc. Yet, his carefully crafted opinion reflects confusion about admiralty tort and contract jurisdiction.

Litigants and state courts would benefit from a test which they can easily understand and apply. A bright line test for jurisdiction will enable litigants to know when to retain admiralty lawyers. With the present test, non admiralty lawyers and judges will continue to be

tempted to apply the law they know - state law - in close cases or even in cases not so close. Existing practice in state court does not necessarily bear out the observations in Grubart that the "customary practice in seeing jurisdiction as the norm when the tort originates with a vessel in navigable waters, and in treating departures from the locality principle as the exception". 115 S.Ct. at 1055. The need will still exist post Grubart for a test which is wholly objective at least insofar as shipboard incidents are concerned.

The case is also important from the admiralty contract jurisdiction standpoint. The courts of appeal here demonstrated a basic lack of understanding about when a contract falls within admiralty jurisdiction. The court of

appeal utterly failed to consider that petitioner contracted with Stop for equipment that was used on a vessel. The nexus requirement for contract jurisdiction as defined by the admiralty tort jurisdiction cases will cause courts to continue to grapple with the problem of whether an agreement to equip a vessel should per se be recognized as within admiralty contract jurisdiction.

CONCLUSION

Petitioner prays that certiorari issue to the Louisiana Court of Appeal, First Circuit for the foregoing reasons.

Respectfully submitted

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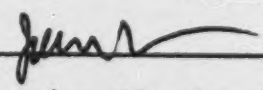
By 
John Blackwell

NO. _____

SUPREME COURT OF THE UNITED STATES
October Term, 1994

ORYX ENERGY COMPANY,
Petitioner,

V.

YVETTE BOURQUE, WIFE OF AND STEVEN BOURQUE, SAFETY TECHNOLOGY AND OILFIELD PROTECTORS, INC. and AETNA CASUALTY & SURETY COMPANY,
Respondents.

APPENDIX

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YVETTE BOURQUE,	:	NO. 82,516-E
WIFE OF/AND	:	
STEVE BOURQUE	:	16TH JUDICIAL DISTRICT COURT
VS.	:	
	:	PARISH OF ST. MARY
SUN GAS COMPANY,	:	
INC., ET AL	:	STATE OF LOUISIANA

AMENDED ANSWER

Defendants, SUN GAS COMPANY, INC., SUN EXPLORATION AND PRODUCTION COMPANY and SUN OPERATING LIMITED PARTNERSHIP, appearing through undersigned counsel, amend their answer to the petitions of plaintiff as follows:

1.

By adding as an additional paragraph the following:

"At all times material herein, plaintiff was working on a barge on

navigable waters in a maritime employment such that he was a covered worker under the United States Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Section 901, et seq., that his claim and all incidental claims are governed by the maritime law and in particular 33 U.S.C. Section 901, et seq, to the exclusion of all state law claims including all claims under Civil Code Articles 2315, 2317, 2322, 2315.3 and further to the exclusion of any liability for engaging in an ultrahazardous activity and further defendants aver that at all times material herein, they were the "vessel".

WHEREFORE, defendants, SUN GAS COMPANY, INC., SUN EXPLORATION AND PRODUCTION COMPANY and SUN OPERATING LIMITED PARTNERSHIP, pray that after due proceedings had, the demands of Steve Bourque and Yvette Bourque be rejected and

there be judgment in favor of defendants dismissing plaintiff's petition with prejudice at petitioner's cost and for all other relief to which defendants are entitled in the premises.

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Attorneys for Sun Gas Company, Inc., Sun Exploration and Production Company and Sun Operating Limited Partnership
By/s/ John Blackwell
John Blackwell

O R D E R

Considering the foregoing,

IT IS HEREBY ORDERED that defendants be and the same are hereby allowed to file the foregoing amended answer.

Franklin, Louisiana, this 21st day of September, 1988.

/s/ M. J. McNulty, Jr.

JUDGE, 16TH JUDICIAL DISTRICT COURT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amended Answer has this date been forwarded to all counsel of record by depositing a copy of same in the U.S. Mail, postage prepaid.

New Iberia, Louisiana, this 20th day of September, 1988.

/s/ John Blackwell

John Blackwell

YVETTE BOURQUE and	DOCKET NO: 82,516,
STEVEN BOURQUE	DIVISION G
	16TH JUDICIAL
VERSUS	DISTRICT COURT
	PARISH OF ST. MARY
SUN GAS CO., ET AL	STATE OF LOUISIANA

This is a tort suit filed by Yvette Bourque and Steven Gerard Bourque against Sun Gas (now Oryx Energy) and STOP (Safety Technology Oilfield Protectors), both corporate defendants having their principal place of business in Texas but operating in Louisiana. Aetna Casualty and Surety intervened as the worker's compensation carrier for the company (Pro Tech) which employed Steven Bourque at the time of the incident which gave rise to this suit. Steven Bourque seeks damages for his injury, his medical expenses (past and future), and his lost

wages (past and future). Aetna seeks to recover from the two defendants for reimbursement for amounts paid to Steven Bourque in weekly indemnity benefits and medical expenses. Those amounts reached a total of $106,515.53 by the time of the trial of this matter - and Aetna seeks recovery of additional benefits which may be paid from the date of trial forward until the case is ultimately resolved.

Yvette Bourque has claimed damages for loss of consortium.

The incident which gave rise to this action occurred on February 9, 1987 as the plaintiff Steven Bourque and another employee of Pro Tech (a company specializing in contracting to perform "well testing" activities) were engaged in what was hoped to be a routine test of a well located at Belle Isle #13 in the navigable waters surrounding the well.

The purpose of the test was to

determine the productive capacity of the well for the purpose of deciding whether to bring it back into production. This process required the "flowing" of the well and the test of levels of fluids (oil and other fluids) which would flow through tanks especially rigged and designed for that purpose.

When such wells are tested, an ever present danger from the possible presence of hydrogen sulfide exists. Hydrogen sulfide (H2S) is, as was described by the various experts, a colorless gas which is not succeptable of olfactory detection except at very low levels of concentration. H2S is apparently a common byproduct of the disintegration of organic matter and is not infrequently found in oil below the surface. As the oil is released into a tank, the H2S separates from the liquid solvent and forms a deadly layer of gas. The gas is referred to by

experts as a "cytachrome oxidase inhibitor" which interferes with the ability of human cells to utilize oxygen. The brain and the central nervous system are described as "target organs" which are very susceptible to its effects.

Because the "well testing" techniques common in the industry in 1987, and today, required a man to climb atop the test tank and lift a hatch (called a "thief hatch") in order to drop a metal strap into the test tank as a means of measuring productive capacity, the danger of encountering H2S arising from the open hatch is ever present when testing a "sour well," i.e. one in which H2S is dissolved in the subsurface oil reserves.

As a result of the danger of H2S exposure, well testers are trained in the dangerous properties of H2S and are trained to use a self contained breathing apparatus (SCBA) designed to permit a

worker with reasonable safety to enter an IDLH atmosphere (immediately dangerous to life and health) containing toxic levels of H2S. Companies such as defendant STOP provide such equipment and, if necessary, training to employees of companies, such as Pro Tech (plaintiff's employer) which specialize in performing such tests for oil companies such as defendant, Sun Gas.

The well test at Belle Isle #13 in February of 1987 was being conducted with an awareness of the presence of H2S. Tests in 1981 indicated that the well was "sour" and, although the degree of concentration is a sharply contested matter, all of the evidence clearly shows that H2S was found to be present in potentially toxic concentrations. The uncontested evidence shows that sun Gas contracted with STOP to provide SCBA equipment and monitors to detect and sound warning alarms if concentrations of a

relatively low amounts of H2S were detected in the atmosphere.

The contract between STOP and Sun Gas contains an indemnity agreement by which STOP agreed to indemnify Sun Gas against claims arising from the testing of the well. Whether that contractual agreement is enforceable as between the parties (STOP and Sun Gas) in view of the Louisiana anti-indemnity provisions of La. R.S. 9:2780 is also an issue in this litigation.

In order to test the well at Belle Isle #13, the well testing equipment and operations were set up on two barges which were moved adjacent to one another and adjacent to the well because the well was located in navigable waters. Thus, whether this case should be governed by principles of Louisiana tort law or by maritime law is also an issue.

The defendants have sharply contested

plaintiff's claim that he was exposed to the H2S. They further raise questions concerning whether any of plaintiff's alleged neurological defects were the product of H2S exposure (if plaintiff was exposed) or rather were the result of pre-existing injury, or malingering.

The uncontested facts show that at about 10:30 a.m., the plaintiff (Steven Bourque) and Ricky Rochel, a fellow employee of Pro Tech, donned self contained breathing gear and walked from the "safe barge" to the "work barge" on which the well testing apparatus was located for the purpose of conducting a test. Steve Bourque climbed to the top of the tank, opened the "thief hatch" and dropped the metal strap into the tank. He rolled up the strap, closed the hatch, and descended the ladder to the deck of the barge, and collapsed. Rochel and others saw Bourque collapse and ran to this aid.

They helped Bourque to his feet and carried him from the work barge to the safe barge. Medical assistance was summoned and Bourque was eventually transported by boat and then by helicopter to the Lakewood Hospital Emergency room in Morgan City, Louisiana. Bourque was examined and eventually released shortly thereafter. He was driven home and was instructed to contact his family physician.

Thereafter began a series of events which plaintiffs contend were the result of H2S exposure. Subsequently, this suit was filed.

Although the incident in question occurred aboard a barge moved adjacent to a well located in navigable waters, this court is convinced that Louisiana tort law, not general maritime or admiralty law, applies. The mere proximity of the incident to navigable waters and the mere

fact that the incident occurred on a barge located in such waters does not give the activity the "salty flavor" required in order for federal maritime law to govern. As Judge Brown said in Domingue v. Ocean Drilling, 923 F. 2d 393 (5th Cir. 1991),

> "A specialty services contract (Wire Line Services) related to oil and gas exploration and drilling takes on a salty flavor when the performance of the contract is more than incidently related to the execution of the vessel's mission." Id. at 396.

In Domingue, the court held that wire line services are "distinctly non-maritime in nature." Id. at 396, citing Thurmond v. Delta Wells Surveyors, 836 F. 2d 952 (5th Cir. 1988). See also Bergeron v. Blake Drilling, 599 So. 2d 827 (La. App. 1st Cir. 1992). As Judge Savoie noted in Bergeron, the Supreme Court of the United

States has set forth "two requirements for admiralty jurisdiction: maritime locality and maritime flavor." Id. at 835. Although maritime locality is certainly present here, the "well testing" process was not performed in a manner different from the way such testing would occur of a land based well. The only difference, according to the testimony presented, would be the fact that the equipment could be spread over a wider area. The essential nature of the activity is unchanged by its mere maritime locale. The mere fact that there were warnings for watercraft to remain out of the area (due to the potential danger from possible H2S discharge from the vents of the well testing apparatus) does not govern. As noted in Bergeron, even if there is a potential hazard to maritime activity, "the party seeking to invoke admiralty jurisdiction must show a substantial

relationship between the activity giving rise to the incident and traditional maritime activity . . . ." Bergeron at 836. As stated earlier, the relevant activity, well testing, like wire line services, is an activity related to the exploration for and production of oil and gas. It is not "traditional maritime activity."

Therefore, from this conclusion, this court must find that the Louisiana law of torts governs. Further, this court reaffirms its earlier determination that the provisions of the Louisiana Oilfield Indemnity Act have the effect of rendering void the indemnity provision of the contract between Sun Gas and STOP. See Matte v. Zapafa Offshore, 784 F. 2d 628 (5th Cir. 1986); Lirette v. Union Texas Petroleum, 467 So. 2d 29 (La. App. 1st

Cir. 1985). The fact that the contract itself provides that Texas law (which does not prohibit such indemnity agreements) is to govern in construing the contract is of no avail to Sun Gas. Although Louisiana does permit parties to select the law which controls their contractual relationship, this right must yield when the "choice of law" provision violates the public policy of the State of Louisiana (as expressed in La. R.S. 9:2780). See Matte, above; Lirette, above. As Judge Politz said in Matte, "we will not participate in such an obvious end-run of the Louisiana Legislature's effort to improve oilfield safety." Matte at 631.

Because the law of Louisiana controls the determination of the questions of law, the nature of the activity becomes a prominent factor in this litigation. Plaintiffs urge that "well testing" of this type, like the wire line services

involved in Bergeron, should be deemed "ultra hazardous". See Kent v. Gulf States, 418 So.2d 493 (La. 1982); Bergeron v. Blake Drilling, above. As Justice Lemmon said in Kent, such activities, while reasonable and socially beneficial, create a "high enough" risk of harm that "the party ought not undertake the activity without assuming the consequences." Kent at 498. See also T. Galligan, Strict Liability in Action: The Truncated Learned Hand Formula, 52 La. L. Rev. 323 (1991). In Kent, the court said:

> "For these particular activities, Louisiana courts have imposed an absolute (emphasis in original) liability . . ., which virtually makes the enterpriser an insurer. The enterpriser, whether or not negligent in any respect, causes the damage, and the injured party recovers simply by proving damage

> and causation (emphasis in original. In these cases of absolute liability (or liability without proof of negligence or other fault), liability is imposed as a matter of policy when harm results from the risks inherent in the nature of the activity ...." Kent, at 498.

See also Bergeron, above, quoting from Kent.

As Professor Galligan wrote in describing the Louisiana doctrine of "absolute liability":

> "In Kent, . . . , Justice Lemmon referred to this category of tort liability as 'absolute liability.' In essence, it is Louisiana's version of Rylands. My colleague, Professor Frank Maraist, like Justice Lemmon, also calls this type of liability

absolute liability. [F. Maraist, Louisiana Tort Law Cases and Materials, Ch. 16 (1990).]

* * * *

Generally, if the activity is one which exposes the defendant to Rylands-type liability, he or she is liable despite the fact that the social utility of the activity may outweigh its risk. The activity presents a reasonable risk of harm but the defendant is still liable. ..... Utility is greater than risk but the defendant would nevertheless be found liable under an absolute liability theory.

* * * *

In any absolute liability case, balancing is necessarily involved; however, that balancing usually takes place at the activity level. Should one who engages in this

> reasonable, but dangerous, activity pay the damages she causes even though she has acted reasonably? Courts decide whether or not, given the policies at stake, it is appropriate to impose Rylands-type liability upon the activity in question. Once a court determines an activity is within (or without) the scope of Rylands absolute liability, it, in effect, creates a categorical rule. Trial courts do not subsequently engage in a risk/utility balance at a case specific level." 52 La. L. Rev. at 336-337.

Professor Galligan also points out that whether an activity is "ultra hazardous" (abnormally dangerous) is a question of law. 52 La. L. Rev. at 337. However, he reminds the reader that "whether or not the risk is within the scope of defendant's absolute liability is always

an issue. ... [P]roximate cause or scope of duty is still an issue." 52 La. L. Rev. at 338.

This case thus requires this court to determine whether the specific type of activity involved should be deemed "ultra hazardous." As the court of appeal in Bergeron said:

> "In Triplette v. Exxon Corp., 554 So. 2d at 1362, the court stated that the following elements are used to determine whether an activity is ultra hazardous; the activity must relate to land or some other immovable; the activity itself must cause the injury, and the defendant must be engaged directly in the injury producing activity; the activity must not require substandard conduct to cause injury. This third element requires that the activity 'can

> cause injury to others even when conducted with the greatest prudence and care.' Triplette v. Exxon, 554 So. 2d at 1362. In Triplette, our court decided whether the defendant was engaged in an ultra hazardous activity on the issue of whether the activity's risk of harm could be eliminated through due care to be the salient issue . . .." Bergeron, at 838.

The court must apply the principles set forth to the activity involved in this case: sending a man to the top of a tank known to contain potentially toxic levels of a deadly gas for the purpose of his opening a hatch to test fluid levels, a procedure which will release the gas, if present, in close proximity to him. The activity is, as was shown by the testimony presented in this case, fraught with danger even if the man is wearing a

positive pressure self contained breathing apparatus which he has been trained to use in a proper fashion. Although, as noted by Justice Lemmon in Kent, and by Professor Galligan in his article, Louisiana cases finding activities to be "ultra hazardous" normally involve situations in which the "victim seldom has the ability to protect himself," this court is satisfied that this criteria, if it is a "criteria," has been satisfied here. See Kent, at 499. See also T. Galligan, Strict Liability in Action, above.

The procedures utilized by the industry to endeavor to protect workers who are sent into "IDLH" atmosphere (immediately dangerous to life and health) are not "fool proof." The positive pressure respirators used in this well test process (Litton SCBA units) were shown to be "state of the art." A strong

emphasis was placed on safety training and on being sure that the well testers were skilled in the proper use of the respirators and of the importance of securing a good "face seal" despite the added safety of the "positive pressure" respirators. In such devices, air flows out of the mask if the seal is slightly broken - rather than ambient air leaking into the "negative pressure". The very nature of the physical activity (climbing ladders, opening hatches, dropping lines into hatches, etc.) gives rise to a very substantial risk that even a careful worker may dislodge his mask. If the seal is broken or is not fixed properly in the first place, there is a risk that ambient air may intrude into the mask. This court accepts the testimony of the witnesses who said that the "eddy effect" can produce an intrusion despite the "positive pressure" inside the mask.

Despite the fact that the precautions taken in the detonating procedures employed in wire line testing are designed to prevent premature explosions (and resultant injury), the court of appeals in Bergeron found wire line testing to be "ultra hazardous." This court sees a clear analogy between exposing (of necessity) men to the risks associated with detonation of explosives and exposing (again, of necessity) men to highly toxic gas (such as H2S).

The fact that the common practice in the industry was not to have "sight glasses" affixed to tanks for the purpose of gauging production levels without opening a hatch does not mean that the entire industry is or was negligent. For various sound reasons which were explained by witnesses, the procedure utilized in this case was the common practice in February of 1987 - and remains so today.

The utility of the endeavor and the industry's efforts to preclude injury by taking reasonable and normally effective safety measures does not preclude a finding that the activity was ultra hazardous. See Galligan, Strict Liability in Action, above.

Having determined that the activity, "strapping a well" through the "thief hatch" in well testing a "sour (H2S) well" is an ultra hazardous activity, this court must determine whether the alleged injury in this case fell within the scope of the risk. This is a very easy decision. The danger of H2S exposure is the danger which makes this procedure "ultra hazardous" and, obviously, such exposure is the primary risk involved.

Thus, Sun Gas, not STOP, was engaged in an ultra hazardous activity. It is therefore "absolutely liable" if Steven Bourque was injured and if such activity

was the cause of Steven Bourque's injury. STOP's activity, rental of safety equipment, is not ultra hazardous and STOP is liable only if negligent conduct on STOP's part was a contributing factor in producing injury.

The evidence presented at trial revealed no negligence on the part of either STOP or Sun Gas. There is no evidence that the equipment furnished by STOP malfunctioned or that STOP was negligent in any fashion. Furthermore, despite the inherently dangerous nature of the activity involved, Sun Gas did everything feasible to eliminate risks of harm. As was made clear, particularly by the testimony of Mr. Montgomery, a petroleum engineer with extensive experience, there were no steps that Sun Gas could have taken which might have reduced the chance that an accidental exposure, as was involved in this case,

would have occurred. The placement of "bug blowers" was impractical due to the configuration of the equipment. Burning ("flaring"), as opposed to "venting," the H2S produced in the tank created risks of its own. And, as noted, the use of "sight glasses" to avoid the need to open the tank (thereby eliminating the greatest danger of H2S exposure) was not an industry practice. Therefore, the court rejects any suggestion that punitive damages pursuant to La. C.C. art. 2315.3 are appropriate.

STOP would only be liable to judgment if required to indemnify Sun Gas. However, due to the unenforcibility of that provision pursuant to the Louisiana statute (discussed above), STOP is not liable for any damages which may have been occasioned by plaintiffs. This suit is dismissed as to STOP.

The most difficult issues in this case remain to be resolved. They obviously are whether Steven Bourque suffered an exposure to H2S (by the invasion of the gas into his face mask) and whether (and to what extent) he suffered injury caused by his exposure. Most of the testimony in this case focused the court's attention on these issues. As this court stated at the end of the presentation of evidence, counsel for all three of the principal parties in this litigation (the Bourques, STOP, and Sun Gas) did a remarkably excellent job in presenting direct and circumstantial evidence in support of their respective positions. While the highly competent and professional job by counsel clearly defined the issues of law and fact for the court, the issues of fact were vigorously contested and are very difficult to decide. Knowing that the court of appeal

can review the record in this case (as was ably developed by counsel) and can correct manifestly erroneous factual determinations (as well as errors of law) provides this trial court with some measure of comfort to offset the difficulty in deciding these basic factual issues.

Despite the presence of significant conflicting evidence, this court finds that the evidence preponderates in favor of a finding that Steven Bourque was exposed to hydrogen sulfide while "strapping the tank" at about 10:30 a.m. on February 9, 1987.

Several factors lead this court to this conclusion. The major factor is the obvious and unquestioned presence of hydrogen sulfide being given off by the "sour well" at Belle Isle #13 which was being tested. Although there was a sharp conflict over whether the concentration of H2S was in the approximate range of 14,000

as opposed to 1400 ppm in the test tank, either amount could produce serious injury or death. At the higher concentration, the gas is even more lethal and an intrustion of a very small amount of ambient air at that concentration could produce serious consequences for a human being who inhaled the gas. The evidence, while conflicting, nevertheless clearly shows that H2S was present in the tank in concentrations which could produce the symptoms displayed by Steven Bourque immediately after inhaling. The fact that the alleged damage was as mild as it was in comparison to the possible harm from H2S exposure of higher concentration is not inconsistent with exposure even accepting the defendants' evidence tending to prove the lower concentration.

The court, as noted earlier, also accepts the opinion expressed by plaintiff's witnesses who testified that a

breach of the face seal of a "positive pressure" respirator mask will sometimes permit intrusion of ambient air due to an "eddy effect." This is certainly a critical finding because the court does not find that the Litton SCBA unit being used by Steven Bourque malfunctioned on the day in question.

The inability of the defendant to produce the unit used by Steven Bourque does not lead the court to conclude that the unit did not function properly. Testimony established that all units provided by STOP for the Sun Gas well test at Belle Isle #13 were tested and found to be in good working order. After the incident, the unit worn by Steven Bourque was tested, among the others, and was found to be in good operating order. Further, that unit was used by an employee later that day. Steven Bourque did not detect any problem with the unit he was

wearing at the time of the incident. He was experienced and trained in the proper use of a SCBA.

The failure of Sun Gas and STOP to isolate effectively the unit Steven Bourque was wearing is very unfortunate. Its absence prevented Sun Gas from proving that no intrustion could have occurred even if the face seal was broken in such a fashion as would only produce the alleged "eddy effect" (rather than a larger breach - which plaintiff would have noticed - and which plaintiff testified did not occur).

The court is also impressed with the fact that the circumstances and the symptoms presented by Steve Bourque led the various assembled other workers, safety technicians, supervisors, etc. to conclude the Mr. Bourque had suffered a "hit" with H2S. What they saw was, in their minds, consistent with plaintiffs position at trial: i.e., that he received

some degree of exposure. Although able defense counsel elicited evidence that Steven Bourque did not present certain symptoms - and that some symptoms, especially dizziness, were pre-existing complaints in his military health records, or could have been produced by fatigue, the symptoms were consistent with an exposure to the level of concentration suggested by Dr. Alexander, one of the plaintiff's experts.

If ambient air containing a fatal concentration of H2S entered the mask due to a breach in the face seal, the diluting effect of the "good air" in the mask would help to protect the SCBA wearer even though some exposure might occur. The exposure could not have been extremely high because otherwise immediate loss of consciousness or death would have occurred.

In this case, Steven Bourque began to feel "light headed," rolled up the tape, closed the "thief hatch" and climbed down the ladder to a point very close to the barge deck - and collapsed, causing his co-workers to come to his rescue.

The court does not believe that the entire scenario was a "show" enacted for the purpose of initiating this action. The evidence convinces the court that "something" made Steven Bourque feel the necessity to dismount. He reacted as responsibly as he could under the circumstances and got down as promptly as possible.

His earlier failure to achieve a good face fit may have some bearing on this matter. The testimony of the plaintiff Steven Bourque established that he initially failed to secure a good "face fit." He subsequently adjusted his mask and secured what he believed was a good

face fit. He did a "negative pressure" exercise - breathing in with the mask in place and lowering his head while shaking his head to test whether the mask would stay in place. He thereafter placed the straps in place to hold the mask firmly affixed in proper position. He then proceeded to the work barge. Although he felt on his second try that he had a good fit, the court finds that the circumstances, in light of subsequent events, show that his "fit" did not hold. He testified that he was unaware of the problem and was sure that he did not hit an object causing the mask to be displaced. However, all of the evidence convinces this court that the seal must have been broken in a sufficient degree to permit some "eddying intrustion" without his being aware (until symptoms became apparent) and without permitting intrusion

of a large enough quantity of the ambient air to cause far more serious harm.

The only logical explanation (given the finding that the Litton SCBA unit was not deficient) is that Steven Bourque failed to detect a face mask leak which, due to the "eddy effect," allowed an intrusion of H2S contaminated ambient air. Because securing and maintaining a face seal is the responsibility of the wearer of the SCBA equipment, Steven Bourque was to some degree at fault for the condition which led to his H2S exposure.

Whether principles of "comparative negligence" should apply to a case involving absolute liability is not clear. While Civil Code Article 2323 refers to injury (loss) suffered "as a result partly of his own negligence and partly as a result of the fault of another," absolute liability does not require a showing of "fault" in the sense of

requiring proof of negligence. Nevertheless, principles of comparative fault have been applied in "strict liability" cases. See Pelt v. City of DeRidder, 553 So. 2d 1097 (La. App. 3rd Cir. 1989) and the cases cited therein. See also, Galligan, Strict Liability in Action, above. Therefore, the court feels bound to endeavor to assess a percentage of "fault" to Steven Bourque.

Recognizing the inherent difficulty in using mathematics to express a relationship between the "inattention" of Steven Bourque (which may easily have been the product of fatigue), the court finds that his failure to assure that his face mask was properly in place must be assigned 20% fault in connection with the "loss" occasioned to him by the overexposure.

The question remains regarding the consequences or "loss" suffered by Steven

Bourque as a result of his exposure. That question raises two complex issues: The neurological effects (if any) produced by the exposure (as opposed to effects produced by other causes) and the economic value to be assigned to such loss.

The parties presented the court with a truly impressive array of conflicting expert opinion presented by witnesses infinitely better qualified than the court to draw conclusions regarding "cause" and "effect." Plaintiffs' experts gave very convincing explanations of their opinions that Steven Bourque suffers from neurological defects which are consistent with the type of neurological injury found in persons known to have been exposed to toxic concentrations of H_2S. However, as this court assesses that testimony, Steven Bourque's prior head injury and significant abuse of substances (alcohol and marijuana) could also have produced

the detected anomalies. The defense experts also gave very convincing testimony to the effect that the neurological tests and evaluations failed to disclose the presence of the sorts of defects alleged by the plaintiffs.

Considering all of the evidence of the experts, and the evidence showing Steven Bourque's propensity to malinger and prevaricate, the court does not find that the evidence preponderates in favor of finding that Steven Bourque suffered permanent neurological damage from his exposure to H2S on February 9, 1987.

The court was impressed with the testimony of Dr. Thomas Latour, a psychiatrist who treated Steven Bourque for an extended period fo time. Dr. Latour did not simply conduct evaluations for purposes of rendering expert testimony. He was trying to help Steven Bourque, a man shown to have had

significant psychological disorders before the incident in question, to cope with an anxiety disorder. Dr. Latour found symptoms displayed by Steven Bourque which convinced him (as the symptoms had earlier convinced Dr. Boyer) that Bourque suffered a post-traumatic stress disorder of a chronic type. Dr. Latour has treated others who suffered for similar disorders resulting from oilfield related accidents.

The court finds that Steven Bourque's exposure to H2S on February 9, 1987 caused him to experience such fear and anxiety that he can no longer work as a well tester. The court believes his testimony about his grave anxieties concerning his return to well testing. He was aware of the dangers of H2S and when he became aware that he experienced an exposure the diagnosed post-traumatic stress disorder resulted. Whether this condition would have been produced in someone without

Steven Bourque's pre-existing emotional disorders (as reflected by the various psychological tests) is not at issue.

The diagnosis of Dr. Latour is certainly consistent with the bizarre behavior exhibited by Bourque in the months following his accident. The court does not believe that the nightmares and instances of incontinence did not occur. Dr. Latour's assessment explains the plaintiff's behavior and is consistent with his pre-existing problems, and is consistent with the absence of H2S caused neurological damage.

Thus, the court concludes that the exposure to H2S caused Steven Bourque to experience post-traumatic stress disorder which has impaired his ability to seek employment as a well tester (or in any other job requiring him to be exposed to the dangers normally associated with the

exploration and production of oil and gas).

His disorder created a disruption of his relationship with Yvette Bourque. Although their relations were good at the time of trial, she experienced a loss of consortium during the months Steven Bourque was endeavoring to reshape his life following the accident.

Aetna as intervenor is also, through this action, entitled to recover the medical expenses and indemnity benefits stipulated to have been paid.

Steven Bourque is also entitled to an award which will cover his future expenses for psychiatric treatment related to his post-traumatic stress disorder. Steven Bourque has further established that he will not be returning to work in well testing. He must seek, and the court finds he is capable of seeking, other compensable employment.

Fixing a monetary award is also very difficult - except for the stipulated medical expenses and indemnity benefits. Those amounts were stipulated to come to a total amount of $106,515.53. Those expenses were occasioned as a result of Bourque's exposure and resultant post-traumatic stress disorder.

Mrs. Yvette Bourque's loss of consortium is difficult to evaluate. The evidence portrayed a somewhat "stormy" relationship wich is apparently better (now that both have become active Christians) than the relationship was prior to the accident. His emotional condition prior to the accident was less than ideal. Nevertheless, during the months following the accident, he was more violent and difficult to live with than before. Thus, Mrs. Bourque is entitled to compensation for the "loss of consortium" she experienced while Steven was

endeavoring to grapple with his stress disorder. The court, recognizing the difficulty of assessing value, awards $3000.00 to Mrs. Bourque.

The award of future medical expenses, by its very nature, tends to be somewhat speculative. The plaintiff has, however, proven that some psychiatric counseling will likely be necessary in the future. Dr. Latour felt that counseling will likely be necessary from time to time during periods of stress. The cost of each session may range from $100.00 to $250.00. Because of the difficulty of predicting the need for future visits, the court finds that plaintiff may need to seek such treatment on numerous occasions in the future. The court will use the $250.00 per visit figure and award $10,000.00 in future medical expenses to the plaintiff.

Quantifying the plaintiff's damages for the physical, psychiatric, and emotional disorders occasioned by his H2S exposure is difficult. The ill feelings, nightmares, and emotional trauma are certainly compensable. The "discomfort" occasioned by the exposure was very real to Steven Bourque. However, the evidence, as noted earlier, shows that Steven Bourque had significant pre-existing problems. Discovering which were "symptoms" of the post-traumatic stress disorder, which were aggravated by the disorder, and which were merely pre-existing emotional problems which continued to manifest themselves, is very difficult. Understandably, the defendants emphasized his record of complaints to the Army medical personnel during his rather brief and somewhat unsatisfactory military career.

Considering all of the evidence, the court is satisfied that the sum of $15,000.00 is a fair amount.

As has been stated frequently by courts of appeal, a trial court is engaged in an often speculative inquiry in endeavoring to determine a plaintiff's loss of future income. Because the primary injury here is the post-traumatic stress disorder, determining the loss of past income is also difficult. Plaintiff tried to go back to the oilfield. He did not try to find other employment. During a period of time following his accident, he was undoubtedly "disabled" from performing any work due to his psychiatric condition. However, he chose, for laudable reasons, to pursue a career of service to the church, a decision which may ultimately provide him with far greater rewards than this court could award. Nevertheless, as much as this work

has provided him (as confirmed by Dr. Latour) with a sense of emotional and spiritual growth and helped him to achieve emotional stability, his choice to pursue a relatively impecunious (but spiritually rewarding) position in church work was a voluntary decision. His injury did not, from a legal perspective, "cause" him to chose to follow the teaching of his church.

The court has studied the economists' reports and rehabilitation specialists' reports which are included in the record. The court is aware from the testimony that "well testing" provides, like other oilfield work, an uncertain future. Whether Steven Bourque would have voluntarily quit after a few more years is not at issue. His post-traumatic stress disorder deprived him of the opportunity to continue to engage in well testing, which was clearly shown to be the

most lucrative job plaintiff could perform.

Nevertheless, considering all of the evidence, some employment could have been sought and provided plaintiff with income prior to the trial - other than the low paying church work which plaintiff chose to pursue.

The court, recognizing the speculative nature of this award, finds that the dollar figure should be assigned to plaintiff's loss past wages to be $75,000.00, much of which was paid to him in compensation benefits for which intervenor is entitled to be recompensated. The court finds the amount of $150,000.00 to be a fair amount to compensate him for his loss of earning capacity. The court, in an effort to provide plaintiff a fair opportunity to achieve his maximum earning potential, will award an additional

$2,000.00 to assist plaintiff in securing rehabilitation counseling.

Wherefore, the plaintiffs, Yvette and Steven Bourque, and Aetna, as intervenor, are entitled to judgment against Sun Gas in the amounts set forth in this opinion, with legal interest. The case is dismissed against STOP. Sun Gas is ordered to pay costs of these proceedings.

A judgment will be signed in accordance with the reasons set forth herein.

This 15th day of October, 1992.

/s/ Cheney C. Joseph, Jr.

Chency C. Joseph, Jr.

Judge Pro Tempore

YVETTE BOURQUE,	:	NO. 82,516"E"
WIFE OF/AND	:	
STEVEN BOURQUE	:	
	:	16TH JUDICIAL
	:	DISTRICT COURT
VS.	:	
	:	PARISH OF ST. MARY
	:	
SUN GAS COMPANY,	:	
ET AL	:	STATE OF LOUISIANA
	:	
	:	
	:	

J U D G M E N T

This matter came on for trial on 1 June, 1992 and following days.

PRESENT: STEPHEN B. MURRAY and PATRICIA R. MURRAY attorneys for plaintiffs YVETTE BOURQUE and STEVEN BOURQUE:

JOHN BLACKWELL attorney for ORYX ENERGY COMPANY, formerly Sun Gas Company;

TIMOTHY F. BURR and SCOTT A. SOLE attorneys for SAFETY TECHNOLOGY OILFIELD PROTECTORS, INC.;

MICHAEL S. O'BRIEN attorney for intervenor AETNA CASUALTY & SURETY COMPANY.

The Court having heard the evidence and considering the law and arguments of counsel and for written reasons assigned on 15 October, 1992, finding that Louisiana law is applicable to all claims; that Oryx Energy Company and Safety Technology Oilfield Protectors, Inc. were not negligent but that Oryx Energy Company was liable to plaintiffs because the activity being performed at the time of

the incident was ultrahazardous; that plaintiff Steven Bourque was comparatively at fault for 20% of his damages; that Steven Bourque's damages were as follows:

Past medical expenses	- $39,065.15
Future medical expenses	- 10,000.00
Lost Wages	- 75,000.00
Loss of earning capacity	- 150,000.00
Vocational rehabilitation counseling	- 2,000.00
Physical and mental pain and suffering	- 15,000.00

that Yvette Bourgue's damages for loss of consortium were $3,000.00; and, that Aetna Casualty & Surety Company as intervenor had paid in compensation benefits $106,515.53.

W H E R E F O R E:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of

intervenor AETNA CASUALTY & SURETY COMPANY and against ORYX ENERGY COMPANY in the amount of $85,212.42 with legal interest from date of judicial demand;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of STEVEN BOURQUE and against ORYX ENERGY COMPANY in the amount of $147,639.70 with legal interest from date of judicial demand;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of YVETTE BOURQUE and against ORYX ENERGY COMPANY in the amount of $2,400.00 with legal interest from date of judicial demand;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the issue of Moody fees and expenses is pretermitted and will be

decided by way of post-trial motions.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all claims including the principal demand and the third party demand of Oryx Energy Company for indemnity and contribution against SAFETY TECHNOLOGY OILFIELD PROTECTORS, INC. be and the same are hereby DISMISSED with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that ORYX ENERGY COMPANY be cast for all costs.

THUS DONE AND SIGNED this seventh day of December, 1992, in _____, Louisiana.

/s/ Marcus A. Broussard, Jr.

for CHENEY C. JOSEPH, JR.

JUDGE PRO TEMPORE

16TH JUDICIAL DISTRICT COURT
PARISH OF ST. MARY
STATE OF LOUISIANA

APPROVED AS TO FORM:

/s/ Stephen B. Murray
STEPHEN B. MURRAY

/s/ Patricia R. Murray
PATRICIA R. MURRAY

Attorneys for Plaintiffs

/s/ John Blackwell
JOHN BLACKWELL
Attorney for Oryx Energy
Company

/s/ TIMOTHY F. BURR

TIMOTHY F. BURR

Attorney for Safety

Technology Oilfield

Protectors, Inc.

not approved: M.S.O'B.

MICHAEL S. O'BRIEN

Attorney for Intervenor

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

93 CA 2213

YVETTE BOURQUE, WIFE OF, AND
STEVE BOURQUE

VERSUS

SUN GAS CO., INC. AND SAFETY TECHNOLOGY
AND OILFIELD PROTECTORS, INC., ET AL
(ORYX ENERGY COMPANY, THIRD PARTY
PLAINTIFF AND DEFENDANT-APPELLANT)
JUDGMENT RENDERED: October 7, 1994

ON APPEAL FROM THE SIXTEENTH JUDICIAL DISTRICT COURT (NUMBER 82,516), PARISH OF ST. MARY, STATE OF LOUISIANA

HONORABLE MARCUS A. BROUSSARD, JR., JUDGE AND HONORABLE CHENEY C. JOSEPH, JUDGE PRO TEMPORE.

* * * * * *

Mr. Stephen B. Murray Ms. Patricia R. Murray New Orleans, Louisiana	Counsel for Plaintiffs/ Appellants, Yvette and Steve Bourque
Mr. John Blackwell New Iberia, Louisiana	Counsel for Defendant/ Appellant, Sun Gas Co., Inc.,/ Oryx Energy Company

Mr. Michael S. O'Brien Lafayette, Louisiana	Counsel for Intervenor, Aetna Casualty & Surety
Mr. Scott A. Soule New Orleans, Louisiana	Counsel for Defendant/ Appellee, Safety Technology and Oilfield Protectors, Inc.
Mr. P. Bruin Hays, III New Orleans, Louisiana	

* * * * * *

BEFORE: GONZALES, FOGG AND PARRO, JJ.

GONZALES, J.

This is a tort suit filed by Steve and Yvette Bourque for injuries sustained by Mr. Bourque while engaged in the testing of a well located near Belle Isle, Louisiana. On December 7, 1992, the trial

court signed a judgment,[1] finding (1) that the owner of the well, Sun Gas Company, Inc. (Sun Gas) (subsequently referred to as Oryx Energy Company (Oryx)), was liable to the Bourques based on its conclusion that the activity at issue was ultrahazardous; (2) that Mr. Bourque was comparatively at fault for 20% of his damages; (3) that Oryx was liable to Aetna Casualty & Surety Company (Aetna), the workers' compensation insurer of Mr. Bourque's employer, Pressure Read Out Technology, Inc. (Pro-Tech), for reimbursement of amounts paid to Mr. Bourque; (4) that there was no negligence on the part of Safety Technology and Oilfield Protectors, Inc. (STOP), a

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1 The Honorable Cheney C. Joseph, Jr., Judge Pro Tempore, presided over the trial of this case and also rendered the December 7, 1992 judgment.

company which provided certain safety equipment to Oryx for use during the well testing, and that all claims by Oryx against STOP were to be dismissed with prejudice; and (5) that the issue of Moody fees and expenses was to be pretermitted for decision by way of post-trial motions. On May 4, 1993, the trial court signed a judgment,[2] denying plaintiffs' motion to tax Moody costs, denying STOP's motion to tax costs against plaintiffs, and granting plaintiffs' motion and STOP's motion to tax costs and expert fees against Oryx.

Following entry of the trial court judgments, appeals were lodged by Oryx and by Mr. and Mrs. Bourque.

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2 The Honorable Marcus A. Broussard, Jr. rendered the May 4, 1993 judgment.

Oryx raises the following assignments of error:

1. The trial court erred as a matter of law in applying state law instead of maritime law and finding Oryx was liable for engaging in an ultrahazardous activity.
2. The trial court erred in holding that the contract between Oryx and STOP was not a maritime contract and thus was voided by the Louisiana Oilfield Anti-Indemnity Act, La. R.S. 9:2780.
3. The trial court erred in finding that a well test conducted on a barge in the presence of H2S was an ultrahazardous activity because that activity does not relate to land and if the testing is done safely with the proper equipment there can

be no injury unless there is substandard conduct.

4. The trial court's finding that the plaintiff was exposed to H2S through an undetectable leak and the eddy effect was manifestly erroneous and against the great weight of the evidence.

5. If the plaintiff inhaled H2S because of an undetectable leak in the mask produced by the eddy effect, the trial court was in error as a matter of law in finding STOP was not strictly liable under Civil Code Article 2317 and negligent under Civil Code Article 2315 because (1) it was the only party that was aware of the eddy effect, and (2) it was the custodian of a thing which was unreasonably dangerous in normal use, i.e.,

a SCBA unit which could allow the intrusion of H2S into a mask without the knowledge of the user.

6. The trial court was clearly erroneous when it failed to assess plaintiff's comparative fault not only by reference to his substandard conduct but also by his "awareness of the danger."

7. The trial court was in error in finding that plaintiff was entitled to loss of earning capacity where he retained the physical capacity to earn the same wages as before the accident.

8. The trial court erred in taxing as cost expert fees for time not spent in court, gathering

evidence or preparing to testify.

The Bourques raise the following assignments of error:

1. The trial court erred when it held plaintiff to be 20% at fault, despite its finding that he performed as he had been trained and instructed, and responded to the emergency in which he found himself as responsibly as he could under the circumstances.
2. The trial court's awards of $15,000.00 in general damages to Steve Bourque and $3,000.00 for loss of consortium to Yvette Bourque were grossly inadequate.
3. The trial court erred when it failed to assess Moody costs against Aetna, the compensation insurer.

The facts of this case were succinctly set forth by the trial court in its October 15, 1992 reasons for judgment, as follows:

> The incident which gave rise to this action occurred on February 9, 1987 as the plaintiff Steven Bourque and another employee of Pro Tech (a company specializing in contracting to perform "well testing" activities) were engaged in what was hoped to be a routine test of a well located at Belle Isle #13 in the navigable waters surrounding the well.
>
> The purpose of the test was to determine the productive capacity of the well for the purpose of deciding whether to bring it back into production. This process required the "flowing" of the well and the test of levels of fluids (oil and other fluids) which would flow

through tanks especially rigged and designed for that purpose.

When such wells are tested, an ever present danger from the possible presence of hydrogen sulfide exists. Hydrogen sulfide (H2S) is, as was described by the various experts, a colorless gas which is not succeptable[sic] of olfactory detection except at very low levels of concentration. H2S is apparently a common byproduct of the disintegration of organic matter and is not infrequently found in oil below the surface. As the oil is released into a tank, the H2S separates from the liquid solvent and forms a deadly layer of gas. The gas is referred to by experts as a "cytachrome[sic] oxidase inhibitor" which interferes with the ability of human cells to utilize oxygen. The

brain and the central nervous system are described as "target organs" which are very susceptible to its effects.

Because the "well testing" techniques common in the industry in 1987, and today, required a man to climb atop the test tank and lift a hatch (called a "thief hatch") in order to drop a metal strap into the test tank as a means of measuring productive capacity, the danger of encountering H2S arising from the open hatch is ever present when testing a "sour well," i.e. one in which H2S is dissolved in the subsurface oil reserves.

As a result of the danger of H2S exposure, well testers are trained in the dangerous properties of H2S and are trained to use a self contained breathing apparatus

(SCBA) designed to permit a worker with reasonable safety to enter an IDLH atmosphere (immediately dangerous to life and health) containing toxic levels of H2S. Companies such as defendant STOP provide such equipment and, if necessary, training to employees of companies, such as Pro Tech (plaintiff's employer) which specialize in performing such tests for oil companies such as defendant, Sun Gas.

The well test at Belle Isle #13 in February of 1987 was being conducted with an awareness of the presence of H2S. Tests in 1981 indicated that the well was "sour" and, although the degree of concentration is a sharply contested matter, all of the evidence clearly shows that H2S was found to be

present in potentially toxic concentration. The uncontested evidence shows that Sun Gas contracted with STOP to provide SCBA equipment and monitors to detect and sound warning alarms if concentrations of ... relatively low amounts of H2S were detected in the atmosphere.

The contract between STOP and Sun Gas contains an indemnity agreement by which STOP agreed to indemnify Sun Gas against claims arising from the testing of the well. Whether that contractual agreement is enforceable as between the parties (STOP and Sun Gas) in view of the Louisiana anti-indemnity provisions of La. R.S. 9:2780 is also an issue in this litigation.

In order to test the well at Belle Isle #13, the well testing

equipment and operations were set up on two barges which were moved adjacent to one another and adjacent to the well because the well was located in navigable waters. Thus, whether this case should be governed by principles of Louisiana tort law or by maritime law is also an issue.

The defendants have sharply contested plaintiff's claim that he was exposed to the H2S. They further raise questions concerning whether any of plaintiff's alleged neurological defects were the product of H2S exposure (if plaintiff was exposed) or rather were the result of pre-existing injury, or malingering.

The uncontested facts show that at about 10:30 a.m., the plaintiff (Steven Bourque) and Ricky Rochel, a fellow employee of Pro Tech, donned

self contained breathing gear and walked from the "safe barge" to the "work barge" on which the well testing apparatus was located for the purpose of conducting a test. Steve Bourque climbed to the top of the tank, opened the "thief hatch" and dropped the metal strap into the tank. He rolled up the strap, closed the hatch, and descended the ladder to the deck of the barge, and collapsed. Rochel and others saw Bourque collapse and ran to this [sic] aid. They helped Bourque to his feet and carried him from the work barge to the safe barge. Medical assistance was summoned and Bourque was eventually transported by boat and then by helicopter to the Lakewood Hospital Emergency room in Morgan City, Louisiana. Bourque was examined and eventually

released shortly thereafter. He was driven home and was instructed to contact his family physician.

Thereafter began a series of events which plaintiffs contend were the result of H2S exposure.

Subsequently, this suit was filed.

APPLICATION OF STATE TORT LAW RATHER THAN MARITIME LAW AND THE NON-ENFORCEABILITY OF THE INDEMNITY AGREEMENT

In its assignments of error numbers one and two, Oryx claims that the trial court erred in determining that state law governed this case as opposed to maritime law. As a result of the trial court's choice of law, Oryx claims that the trial court also erred in finding that an indemnity clause in the contract between Oryx and STOP, whereby STOP agreed to indemnify Oryx against claims arising from the testing of the well, was unenforceable

under La. R.S. 9:2780, the Louisiana Oilfield Indemnity Act.

With regard to his finding that Louisiana tort law governed rather than maritime law, the trial court stated:

> Although the incident in question occurred aboard a barge moved adjacent to a well located in navigable waters, this court is convinced that Louisiana tort law, not general maritime or admiralty law, applies. The mere proximity of the incident to navigable waters and the mere fact that the incident occurred on a barge located in such waters does not give the activity the "salty flavor" required in order for federal maritime law to govern. As Judge Brown said in Domingue v. Ocean Drilling [and Exploration Company], 923 F.2d 393 (5th Cir.

1991), [cert. denied, ___ U.S. ___, 112 S.Ct. 874, 116 L.Ed.2d 779 (1992)].

> "A specialty services contract [Wire Line Services] related to oil and gas exploration and drilling takes on a salty flavor when the performance of the contract is more than incidently [sic] related to the execution of the vessel's mission." Id. at 396.

In Domingue, the court held that wire line services are "distinctly non-maritime in nature." Id. at 396, citing Thurmond v. Delta [Well] Surveyors, 836 F.2d 952 (5th Cir. 1988). See also Bergeron v. Blake Drilling [& Workover Company], 599 So.2d 827 (La. App. 1st Cir.) [writs denied, 605 So.2d 1117, 1119 (La. 1992)]. As Judge Savoie noted

in Bergeron, the Supreme Court of the United States has set forth "two requirements for admiralty jurisdiction: maritime locality and maritime flavor." Id. at 835. Although maritime locality is certainly present here, the "well testing" process was not performed in a manner different from the way such testing would occur of a land based well. The only difference, according to the testimony presented, would be the fact that the equipment could be spread over a wider area. The essential nature of the activity is unchanged by its mere maritime locale. The mere fact that there were warnings for watercraft to remain out of the area (due to the potential danger from possible H2S discharge from the vents of the well testing apparatus)

does not govern. As noted in Bergeron, even if there is a potential hazard to maritime activity, "the party seeking to invoke admiralty jurisdiction must show a substantial relationship between the activity giving rise to the incident and traditional maritime activity ...." Bergeron at 836. As stated earlier, the relevant activity, well testing, like wire line services is an activity related to the exploration for and production of oil and gas. It is not "traditional maritime activity."

Therefore, from this conclusion, this court must find that the Louisiana law of torts governs. Further, this court reaffirms its earlier determination that the provisions of the Louisiana Oilfield

Indemnity Act have the effect of rendering void the indemnity provision of the contract between Sun Gas and STOP. See Matte v. Zapa[t]a Offshore, 784 F.2d 628 (5th Cir. 1986), [cert. denied, 479 U.S. 872, 107 S.Ct. 247, 93 L.Ed.2d 171 (1986)]; Lirette v. Union Texas Petroleum, 467 So.2d 29 (La. App. 1st Cir. 1985). The fact that the contract itself provides that Texas law (which does not prohibit such indemnity agreements) is to govern in construing the contract is of no avail to Sun Gas. Although Louisiana does permit parties to select the law which controls their contractual relationship, this right must yield when the "choice of law" provision violates the public policy of the State of Louisiana (as expressed

> in La. R.S. 9:2780). See Matte, above; Lirette, above. As Judge Politz said in Matte, "we will not participate in such an obvious end-run of the Louisiana Legislature's effort to improve oilfield safety." Matte at 631.

We agree with the trial court's finding that the well testing engaged in by Oryx did not have sufficient maritime flavor to qualify for maritime jurisdiction. The seminal Supreme Court cases on the reach of federal maritime tort jurisdiction are Executive Jet Aviation v. City of Cleveland, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), Foremost Insurance Company v. Richardson, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982), and Sisson v. Ruby, 497 U.S. 358, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990). Executive Jet first established a two-part "locality-plus-nexus" test for

maritime tort jurisdiction, which was later affirmed and refined in Foremost and Sisson. The tort must have occurred on or over navigable waters, and the wrong alleged must "bear a significant relationship to traditional maritime activity." Gaspard v. Amerada Hess Corp., 13 F.3d 165, 167 (5th Cir. 1994). The relevant activity at issue is the testing of a well located on a water location in an inlet canal. Oryx, as the party seeking to invoke maritime jurisdiction, has the burden of proving a substantial relationship between the well testing and traditional maritime activity. See Sisson, 497 U.S. at ___, 110 S.Ct. at 2897.

In its attempt to meet this burden, Oryx focuses on the fact that the use of two barges was required for the well testing due to the smallness of the well structure. However, the mere use of

barges, which, although typically used for maritime purposes, were used as platforms for the well testing equipment in this case, does not magically convert the activity of well testing into one with a substantial relationship to traditional maritime activity. We agree with the trial court's observation that the relevant activity herein, well testing, is an activity related to the exploration for and production of oil and gas, not traditional maritime activity. We find no error in the trial court's determination that Louisiana law rather than maritime law governs this case.

Because we affirm the use of Louisiana law in this case, we further affirm the trial court's finding that the indemnity agreement between Oryx and STOP is unenforceable under the Louisiana Oilfield Indemnity Act.

This assignment of error is without merit.

TESTING OF A SOUR WELL AS AN ULTRAHAZARDOUS ACTIVITY

In its assignment of error number three, Oryx contends that the trial court erred in finding that the well testing activity at issue constitutes an ultra-hazardous activity, subjecting Oryx to absolute liability. According to Oryx, the well testing is not an ultra-hazardous activity (1) because it does not relate to land and (2) because if the testing is done safely with the proper equipment, there can be no injury unless there is substandard conduct.

With regard to its finding that the well testing constitutes an ultra-hazardous activity, the trial court stated:

> Because the law of Louisiana controls the determination of the

questions of law, the nature of the activity becomes a prominent factor in this litigation. Plaintiffs urge that "well testing" of this type, like the wire line services involved in Bergeron, should be deemed "ultra hazardous". See Kent v. Gulf States [Utilities Company], 418 So.2d 493 (La. 1982); Bergeron v. Blake Drilling, above. As Justice Lemmon said in Kent, such activities, while reasonable and socially beneficial, create a "high enough" risk of harm that "the party ought not undertake the activity without assuming the consequences." Kent at 498. See also T. Galligan, Strict Liability in Action: The Truncated Learned Hand Formula, 52 La. L.Rev. 323 (1991). In Kent, the court said:

"For these particular activities, Louisiana courts have imposed an absolute (emphasis in original) liability . . ., which virtually makes the enterpriser an insurer. The enterpriser, whether or not negligent in any respect, causes the damage, and the injured party recovers simply by proving damage and causation (emphasis in original). In these cases of absolute liability (or liability without proof of negligence or other fault), liability is imposed as a matter of policy when harm results from the risks inherent in the nature of the activity. . . ." Kent,

at 498.

See also Bergeron, above, quoting from Kent.

As Professor Galligan wrote in describing the Louisiana doctrine of "absolute liability":

> "In Kent, . . ., Justice Lemmon referred to this category of tort liability as 'absolute liability.' In essence, it is Louisiana's versions of Rylands. My colleague, Professor Frank Maraist, like Justice Lemmon, also calls this type of liability absolute liability. [F. Maraist, Louisiana Tort Law Cases and Materials, Ch. 16 (1990).]
>
> * * * *
>
> Generally, if activity is one which exposes the defendant

to Rylands-type liability, he or she is liable despite the fact that the social utility of the activity may outweigh its risk. The activity presents a reasonable risk of harm but the defendant is still liable. ...

Utility is greater than risk but the defendant would nevertheless be found liable under an absolute liability theory.

* * * *

In any absolute liability case, balancing is necessarily involved; however, that balancing usually takes place at the activity level. Should one who engages in this reasonable, but dangerous, activity pay the damages she causes even though she has acted reasonably?

> Courts decide whether or not, given the policies at stake, it is appropriate to impose Rylands-type liability upon the activity in question. Once a court determines an activity is within (or without) the scope of Rylands absolute liability, it, in effect, creates a categorical rule. Trial courts do not subsequently engage in a risk/utility balance at a case specific level." 52 La.L.Rev. at 336-337.

Professor Galligan also points out that whether an activity is "ultra hazardous" (abnormally dangerous) is a question of law. 52 La.L.Rev. at 337. However, he reminds the reader that "whether or not the risk is within the scope of defendant's absolute liability is always an

issue.... [P]roximate cause scope of duty is still an issue." 52 La.L.Rev. at 338.

This case thus requires this court to determine whether the specific type of activity involved should be deemed "ultra hazardous." As the court of appeal in Bergeron said:

> "In Triplette v. Exxon Corp., 554 So.2d [(1361)], at 1362 [(La. App. 1st Cir. 1989)], the court stated that the following elements are used to determine whether an activity is ultra hazardous; the activity must relate to land or some other immovable; the activity itself must cause the injury, and the defendant must be engaged directly in the injury producing activity;

> the activity must not require substandard conduct to cause injury. This third element requires that the activity 'can cause injury to others even when conducted with the greatest prudence and care.' Triplette v. Exxon, 554 So.2d at 1362. In Triplette, our court decided whether the defendant was engaged in an ultra hazardous activity on the issue of whether the activity's risk of harm could be eliminated through due care to be the salient issue . . .." Bergeron, at 838.

The court must apply the principles set forth to the activity involved in this case: sending a man to the top of a tank known to contain potentially toxic levels of a

deadly gas for the purpose of his opening a hatch to test fluid levels, a procedure which will release the gas, if present, in close proximity to him. The activity is, as was shown by the testimony presented in this case, fraught with danger even if the man is wearing a positive pressure self contained breathing apparatus which he has been trained to use in a proper fashion. Although, as noted by Justice Lemmon in Kent, and by Professor Galligan in his article, Louisiana cases finding activities to be "ultra hazardous" normally involve situations in which the "victim seldom has the ability to protect himself," this court is satisfied that this criteria, if it is a "criteria," has been satisfied here. See Kent, at 499. See also

T, Galligan, Strict Liability in Action, above.

The procedures utilized by the industry to endeavor to protect workers who are sent into "IDLH" atmosphere[s] (immediately dangerous to life and health) are not "fool proof." The positive pressure respirators used in this well test process (Litton SCBA units) were shown to be "state of the art." A strong emphasis was placed on safety training and on being sure that the well testers were skilled in the proper use of the respirators and of the importance of securing a good "face seal" despite the added safety of the "positive pressure" respirators. In such devices, air flows out of the mask if the seal is slightly broken - rather than ambient air leaking

into the "negative pressure." The very nature of the physical activity (climbing ladders, opening hatches, dropping lines into hatches, etc.) gives rise to a very substantial risk that even a careful worker may dislodge his mask. If the seal is broken or is not fixed properly in the first place, there is a risk that ambient air may intrude into the mask. This court accepts the testimony of the witnesses who said that the "eddy effect" can produce an intrusion despite the "positive pressure" inside the mask.

Despite the fact that the precautions taken in the detonating procedures employed in wire line testing are designed to prevent premature explosions (and resultant injury), the court of appeal[] in

Bergeron found wire line testing to be "ultra hazardous." This court sees a clear analogy between exposing (of necessity) men to the risks associated with detonation of explosives and exposing (again, of necessity) men to highly toxic gas (such as H2S).

The fact that the common practice in the industry was not to have "sight glasses" affixed to tanks for the purpose of gauging production levels without opening a hatch does not mean that the entire industry is or was negligent. For various sound reasons which were explained by witnesses, the procedure utilized in this case was the common practice in February of 1987 - and remains so today.

The utility of the endeavor and the industry's efforts to preclude

injury by taking reasonable and normally effective safety measures does not preclude a finding that the activity was ultra hazardous. See Galligan, Strict Liability in Action, above.

Having determined that the activity, "strapping a well" through the "thief hatch" in well testing a "sour (H2S) well" is an ultra hazardous activity, this court must determine whether the alleged injury in this case fell within the scope of the risk. This is a very easy decision. The danger of H2S exposure is the danger which makes this procedure "ultra hazardous" and, obviously, such exposure is the primary risk involved.

Thus, Sun Gas, not STOP, was engaged in an ultra hazardous activity. It is therefore

"absolutely liable" if Steven Bourque was injured and if such activity was the cause of Steven Bourque's injury.

As pointed out by the trial court, an activity determined to be ultrahazardous must, among other requirements, relate to land or some other immovable, and must not require substandard conduct to cause injury. The trial court's written reasons for judgment are silent regarding the "relate to land" requirement.

Oryx first contends that the well testing at issue does not relate to land and therefore cannot constitute an ultrahazardous activity. While relation to land is generally required for a finding of ultrahazardous liability, such is not always the case. The ultrahazardous activity found in Bergeron v. Blake Drilling & Workover Company, Inc., 599 So.2d 827 (La. App. 1st Cir.), writ

denied, 605 So.2d 1117, 1119 (La. 1992), occurred on "a drill barge, a vessel which was floated to the location in Rice Bayou." Bergeron, 599 So.2d at 837. The trial court in Bergeron focused its ultrahazardous inquiry on the nature of the activity being conducted, as did this court on appeal. We find no error in this analysis.

Oryx further contends that the testing of a sour well is not an activity which can cause injury in the absence of substandard conduct. In other words, it is Oryx's position that with proper equipment and proper training, a worker can safely work in the presence of hydrogen sulfide and that injury will only occur when there is substandard conduct or defective equipment.

Although there is evidence in the record to support Oryx's position, there is also evidence which supports the trial

court's conclusion that the testing of a sour well can cause injury even when conducted with the greatest care. Mr. Paul Montgomery, an expert in the field of petroleum engineering, testified at trial regarding the sufficiency of the safety equipment being used at the Oryx well. He also testified that a well test operation in the presence of hydrogen sulfide with reported concentrations as high as 5000 ppm is an extremely hazardous operation which could result in injury even in the absence of any substandard conduct. According to Mr. Montgomery, even the slightest miscalculation or mishap could result in death. Apparently based on this testimony, the trial court concluded that the third element of the ultrahazardous activity determination had been met. The determination that the well testing of a sour well is an activity that can cause injury even in the absence of substandard

conduct constitutes a finding of fact by the trial court. A court of appeal may not set aside a trial court's findings of fact in the absence of "manifest error" or unless they are "clearly wrong." Stobart v. State, Department of Transportation and Development, 617 So.2d 880, 882 (La. 1993). The issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. Even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's, reasonably evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. Stobart, 617 So.2d at 882. The rule that questions of credibility are for the trier of fact applies to the evaluation of expert testimony, unless the stated

reasons of the expert are patently unsound. Lirette v. State Farm Insurance Company, 563 So.2d 850, 853 (La. 1990).

In order to reverse a trial court's factual findings, the documents or objective evidence in the case must so contradict the evidence relied upon by the trial court that a reasonable factfinder would not credit the evidence. Nonetheless, the reviewing court must always keep in mind that if the trial court's findings are reasonable in light of the record in its entirety, the appellate court may not reverse, even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Stobart, 617 So.2d at 882-883; Frost v. Metropolitan Life Insurance Company, 93-0753 (La. App. 1st Cir. 4/8/94) 635 So.2d 706, 712, writ denied, 94-1176 (La. 6/24/94).

After reviewing the record, we find a reasonable basis exists for the trial court's conclusion that the testing of a sour well is an activity which can result in injury even in the absence of substandard care. Although conflicting expert testimony was presented to the trial court, we do not find that the conflicting evidence so contradicts the evidence relied upon by the trial court that a reasonable factfinder would not credit the evidence.

Because we find that all of the requirements of an ultrahazardous activity have been met, we conclude that the trial court did not manifestly err in finding that the well testing being conducted in this case constitutes an ultrahazardous activity.

This assignment of error is without merit.

MR. BOURQUE'S EXPOSURE TO HYDROGEN SULFIDE

In its assignment of error number four, Oryx contends that the trial court committed manifest error in determining that plaintiff was exposed to hydrogen sulfide through an undetectable leak in the face mask caused by the "eddy effect."

With regard to his findings on this issue, the trial court stated:

> The most difficult issues in this case remain to be resolved. They obviously are whether Steven Bourque suffered an exposure to H2S (by the invasion of the gas into his face mask) and whether (and to what extent) he suffered injury caused by this exposure. Most of the testimony in this case focused the court's attention on these issues. ...
>
> Despite the presence of significant conflicting evidence, this court finds that the evidence

preponderates in favor of a finding that Steven Bourque was exposed to hydrogen sulfide while "strapping the tank" at about 10:30 a.m. on February 9, 1987.

Several factors lead this court to this conclusion. The major factor is the obvious and unquestioned presence of hydrogen sulfide being given off by the "sour well" at Belle Isle #13 which was being tested. Although there was a sharp conflict over whether the concentration of H2S was in the approximate range of 14,000 as opposed to 1400 ppm [parts per million] in the test tank, either amount could produce serious injury or death. At the higher concentration, the gas is even more lethal and an intrusion of a very small amount of ambient

air at that concentration could produce serious consequences for a human being who inhaled the gas. The evidence, while conflicting, nevertheless clearly shows that H2S was present in the tank in concentrations which could produce the symptoms displayed by Steven Bourque immediately after inhaling. The fact that the alleged damage was as mild as it was in comparison to the possible harm from H2S exposure of higher concentration is not inconsistent with exposure even accepting the defendants' evidence tending to prove the lower concentration.

The court, as noted earlier, also accepts the opinion expressed by plaintiff[s'] witnesses who testified that a breach of the face seal of a "positive pressure"

respirator mask will sometimes permit intrusion of ambient air due to an "eddy effect." This is certainly a critical finding because the court does not find that the Litton SCBA unit being used by Steven Bourque malfunctioned on the day in question.

The inability of the defendant to produce the unit used by Steven Bourque does not lead the court to conclude that the unit did not function properly. Testimony established that all units provided by STOP for the Sun Gas well test at Belle Isle #13 were tested and found to be in good working order. After the incident, the unit worn by Steven Bourque was tested, among the others, and was found to be in good operating order. Further, that unit was used by an

employee later that day. Steven Bourque did not detect any problem with the unit he was wearing at the time of the incident. He was experienced and trained in the proper use of a SCBA.

The failure of Sun Gas and STOP to isolate effectively the unit Steven Bourque was wearing is very unfortunate. Its absence prevented Sun Gas from proving that no intrusion could have occurred even if the face seal was broken in such a fashion as would only produce the alleged "eddy effect" (rather than a larger breach - which plaintiff would have noticed - and which plaintiff testified did not occur).

The court is also impressed with the fact that the circumstances and the symptoms presented by Steve Bourque led the various assembled

other workers, safety technicians, supervisors, etc. to conclude that Mr. Bourque had suffered a "hit" with H2S. What they saw was, in their minds, consistent with plaintiffs[']' position at trial: i.e., that he received some degree of exposure. Although able defense counsel elicited evidence that Steven Bourque did not present certain symptoms - and that some symptoms, especially dizziness, were pre-existing complaints in his military health records, or could have been produced by fatigue, the symptoms were consistent with an exposure to the level of concentration suggested by Dr. Alexander, one of the plaintiff[s'] experts.

If ambient air containing a fatal concentration of H2S entered

the mask due to a breach in the face seal, the diluting effect of the "good air" in the mask would help to protect the SCBA wearer even though some exposure might occur. The exposure could not have been extremely high because otherwise immediate loss of consciousness or death would have occurred.

In this case, Steven Bourque began to feel "light headed," rolled up the tape, closed the "thief hatch" and climbed down the ladder to a point very close to the barge deck - and collapsed, causing his co-workers to come to his rescue.

The court does not believe that the entire scenario was a "show" enacted for the purpose of initiating this action. The evidence convinces the court that "something" made

Steven Bourque feel the necessity to dismount. He reacted as responsibly as he could under the circumstances and got down as promptly as possible.

His earlier failure to achieve a good face fit may have some bearing on this matter. The testimony of the plaintiff Steven Bourque established that he initially failed to secure a good "face fit." He subsequently adjusted his mask and secured what he believed was a good face fit. He did a "negative pressure" exercise - breathing in with the mask in place and lowering his head while shaking his head to test whether the mask would stay in place. He thereafter placed the straps in place to hold the mask firmly affixed in proper position. He then proceeded to

> the work barge. Although he felt on his second try that he had a good fit, the court finds that the circumstances, in light of subsequent events, show that his "fit" did not hold. He testified that he was unaware of the problem and was sure that he did not hit an object causing the mask to be displaced. However, all of the evidence convinces this court that the seal must have been broken in a sufficient degree to permit some "eddying intrusion" without his being aware (until symptoms became apparent) and without permitting intrusion of a large enough quantity of the ambient air to cause far more serious harm.

The determination that Mr. Bourque was exposed to hydrogen sulfide constitutes a finding of fact by the trial

court. Again, this factual finding cannot be set aside on appeal in the absence of "manifest error" or unless it is "clearly wrong." Stobart, 617 So.2d at 882.

In the instant case, the trial court was presented with multiple permissible, although contradictory, views concerning whether Mr. Bourque was actually exposed to hydrogen sulfide. Having heard the contradictory testimony, and reviewing the objective evidence in the case, the trial court then evaluated the credibility of the witnesses and concluded that "the evidence preponderates in favor of a finding that Steven Bourque was exposed to hydrogen sulfide while "strapping the tank." The trial court based this finding on several considerations, including: (1) the unquestionable presence of hydrogen sulfide being given off by the sour well, (2) the expert testimony indicating that a breach of the face seal of a positive

pressure respirator mask, such as the one worn by Mr. Bourque, will sometimes permit intrusion of contaminated ambient air due to the eddy effect, (3) the expert testimony indicating that the symptoms exhibited by Mr. Bourque after descending the tank were consistent with an exposure to hydrogen sulfide, and (4) the court's further factual finding that the seal of Mr. Bourque's mask was broken to a sufficient degree to allow an intrusion.

After a thorough review of the record, we find that there are ample, reasonable bases in the record for the trial court's finding. We also find no documents or objective evidence in this case that so contradict the evidence relied upon by the trial court that a reasonable factfinder would not credit the evidence. Stobart, 617 So.2d at 882. Nor do we find that the stated reasons for the expert testimony relied upon by the trial

court are patently unsound. As such, the judgment of the trial court cannot be reversed on appeal.

This assignment of error is without merit.

ABSENCE OF LIABILITY ON BEHALF OF STOP

In its assignment of error number five, Oryx contends that the trial court erred in finding STOP free from liability. According to Oryx, if Mr. Bourque was exposed to hydrogen sulfide because of an undetectable leak in the mask produced by the eddy effect, then STOP should be held liable under La. C.C. arts. 2315 and 2317, as (1) it was the custodian of a thing which was unreasonably dangerous in normal use, i.e., a SCBA unit which could allow the intrusion of hydrogen sulfide into a mask without the knowledge of the user, and (2) it was the only party that was aware of the eddy effect.

To find a defendant strictly liable

under La. C.C. art. 2317, the plaintiff must prove that (1) the thing which caused damage was in the defendant's custody and control (garde); (2) the thing had a vice or defect which created an unreasonable risk of harm; and (3) the injuries were caused by a defect. Socorro v. City of New Orleans, 579 So.2d 931, 937 (La. 1991). In this case, the trial court specifically found that the SCBA equipment provided by STOP was "state of the art" equipment in the field of well testing and that the particular unit used by Mr. Bourque did not malfunction on the day in question and was in good operating order. We accept this factual determination which is supported by the record and is not manifestly erroneous. Thus, even if STOP is considered to have maintained the custody and control of the SCBA equipment leased to Oryx (which we need not decide), it is clear that any injuries suffered by

Mr. Bourque were not caused by a defect in the SCBA unit he was wearing because, according to the factual findings of the trial court, the unit was not defective. Absent a finding of a defect which caused injury, there can be no finding of strict liability.

Further, the trial court specifically found that "[t]he evidence presented at trial revealed no negligence on the part of either STOP or Sun Gas. There is no evidence that the equipment furnished by STOP malfunctioned or that STOP was negligent in any fashion." A finding of negligence, or in this case, the lack thereof, is a question of fact to be determined by the trier of fact and will not be disturbed by a reviewing court in the absence of manifest error. Berthelot v. Aetna Casualty and Surety Company, 623 So.2d 14, 21 (La. App. 1st Cir. 1993). Although Oryx claims that the trial

court's finding regarding the lack of any negligence by STOP is manifestly erroneous, it fails to point to evidence in the record which indicates negligent behavior by STOP. A thorough review of the record by this court reveals that there is a reasonable factual basis for the trial court's finding. Thus, it will not be disturbed on appeal.

This assignment of error is without merit.

ASSESSMENT OF COMPARATIVE FAULT TO MR. BOURQUE

Both Oryx and the plaintiffs assign as error the trial court's assessment of 20% comparative fault to Mr. Bourque. In its assignment of error number six, Oryx contends that the 20% comparative fault assessed to Mr. Bourque was too low in light of his "awareness of the danger" of working in an environment wherein there was a potential for hydrogen sulfide

exposure. In contrast, the plaintiffs contend, in their assignment of error number one, that Mr. Bourque should have been found free from comparative fault since the trial court found that he performed as he had been trained and that he responded to the emergency situation as responsibly as he could under the circumstances.

With regard to Mr. Bourque's comparative fault, the trial court stated:

> However, all of the evidence convinces this court that the seal must have been broken in a sufficient degree to permit some "eddying intrusion" without his being aware (until symptoms became apparent) and without permitting intrusion of a large enough quantity of the ambient air to cause far more serious harm.

The only logical explanation (given the finding that the Litton SCBA unit was not deficient) is that Steven Bourque failed to detect a face mask leak which, due to the "eddy effect," allowed an intrusion of H2S contaminated ambient air. Because securing and maintaining a face seal is the responsibility of the wearer of the SCBA equipment, Steven Bourque was to some degree at fault for the condition which led to his H2S exposure.

Whether principles of "comparative negligence" should apply to a case involving absolute liability is not clear. While Civil Code Article 2323 refers to injury (loss) suffered "as the result partly of his own negligence and partly as a result

of the fault of another," absolute liability does not require a showing of "fault" in the sense of requiring proof of negligence. Nevertheless, principles of comparative fault have been applied in "strict liability" cases. See Pelt v. City of DeRidder, 553 So.2d 1097 (La. App. 3rd Cir. 1989) and the cases cited therein. See also, Galligan, Strict Liability in Action, above. Therefore, the court feels bound to endeavor to assess a percentage of "fault["] to Steven Bourque.

Recognizing the inherent difficulty in using mathematics to express a relationship between the "inattention" of Steven Bourque (which may easily have been the product of fatigue), the court

> finds that his failure to assure that his mask was properly in place must be assigned 20% fault in connection with the "loss" occasioned to him by the over-exposure.

Before addressing the percentage of fault assessed to Mr. Bourque, we find it necessary to state our views on the correctness of applying comparative fault concepts in the context of an ultrahazardous activity setting. The Louisiana Supreme Court has already determined that principles of comparative fault can be applied in strict products liability cases. In Bell v. Jet Wheel Blast, Division of Ervin Industries, 462 So.2d 166, 171 (La. 1985), the court provided the following policy justification: "Where the threat of a reduction in recovery will provide consumers with an incentive to use a

product carefully, without exacting an inordinate sacrifice of other interests, comparative principles should be applied for the sake of accident prevention."

The exact same policy considerations are at play herein and will cause workers in the well testing industry to be careful for their own safety under a threat of reduction of recovery. Consequently, comparative fault principles are applicable to the ultrahazardous activity at issue in this case.

The allocation of comparative fault is a factual matter lying within the discretion of the trial court, and such determination will not be disturbed on appeal in the absence of manifest error. Ly v. State, Department of Public Safety and Corrections, 633 So.2d 197, 203 (La. App. 1st Cir. 1993), writ denied, 93-3134 (La. 2/25/94) 634 So.2d 835.

In Watson v. State Farm Fire and Casualty Insurance Company, 469 So.2d 967, 974 (La. 1985), the Louisiana Supreme Court set forth guidelines for apportioning fault under the doctrine of comparative fault. The court stated: "In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed." In assessing the nature of the conduct of the parties, the court listed various factors which may influence the degree of fault assigned, including: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger; (2) the extent of the risk created by the conduct; (3) the significance of what was sought by the conduct; (4) the capacities of the actor, whether superior or inferior; and (5) any

extenuating circumstances which might require the actor to proceed in haste, without proper care. Watson, 469 So.2d at 974.

The record establishes that Mr. Bourque was aware of the dangers involved in testing a sour well. He had been a well tester for several years prior to working on the Oryx well site and had experience in dealing with potential exposure to hydrogen sulfide. Considering his prior safety training background, Mr. Bourque was also undoubtedly aware of the necessity of achieving a good face seal with the SCBA equipment. As noted by the trial court, the maintenance of a proper face seal is the responsibility of the wearer of the SCBA equipment.

On the other hand, it is notable that, regardless of Mr. Bourque's awareness, the fact remains that the risk created by exposure to hydrogen sulfide is

great considering the enormous injuries which can result from a single breath of the gas. The trial court specifically found that Mr. Bourque acted responsibly under the circumstances of the exposure.

After a careful review of the record and consideration of the Watson factors, we do not find that the evidence reveals manifest error in the trial court's apportionment of 20% fault to Mr. Bourque.

These assignments of error are without merit.

AWARD FOR LOST EARNING CAPACITY

In its assignment of error number seven, Oryx contends that the trial court erred in awarding $150,000.00 to Mr. Bourque for his loss of earning capacity. In support of this award, the trial court concluded "that the exposure to [hydrogen sulfide] caused Steven Bourque to experience post-traumatic stress disorder which has impaired his ability to seek

employment as a well tester (or in any other job requiring him to be exposed to the dangers normally associated with the exploration and production of oil and gas.)"

It is Oryx's position that an award for lost earning capacity should only be based on a physical incapacity caused by activity rather than upon a plaintiff's "fear" to seek employment in a given occupation.

An award for loss of earning capacity is not predicated on the type of injury suffered by an injured person. Rather, the award is based on the loss or reduction of a person's capability to do that for which he is equipped by nature, training and experience. Henry v. National Union Fire Insurance Company, 542 So.2d 102, 106 (La. App. 1st Cir. 1989), writs denied, 544 So.2d 405 (La. 1989). In the instant case, the trial court

determined that Mr. Bourque's post-traumatic stress disorder impaired his ability to seek employment in the oil and gas industry, specifically in positions which would subject him to the dangers normally associated with that industry. The fact that the injury suffered by Mr. Bourque is primarily of an emotional character, as opposed to manifesting itself in a physical manner, does not negate the fact that his ability to seek work in his chosen profession is now hampered. We find no manifest error in the trial court's award of $150,000.00 for loss of earning capacity.

This assignment of error is without merit.

EXPERT WITNESS FEES

In its assignment of error number eight, Oryx contends that the trial court erred in assessing $8,000.00 as costs for the fees of Bruce Held, an expert retained

by STOP in the field of respirators and respiratory protection. Oryx claims that the award to STOP for Mr. Held's services should be reduced to $1,500.00, representing $1,000.00 per day for the one and one-half days Mr. Held was present at the trial.

It is well settled that an expert witness is entitled to reasonable compensation for his court appearance as well as for his preparatory work. Gibson v. Bossier City General Hospital, 594 So.2d 1332, 1345 (La. App. 2d Cir. 1991). The trial court has the discretion to fix the amount of the fee; consequently, such an award will not be altered on appeal absent a showing of an abuse of discretion. Autin's Cajun Joint Venture v. Kroger Company, 93-0320 (La. App. 1st Cir. 2/16/94) 637 So.2d 538, 544, writ denied, 94-0674 (La. 4/29/94) 638 So.2d 224;

Gibson v. Bossier City General Hospital, 594 So.2d at 1345.

The record indicates that, in addition to testifying at the trial, Mr. Held also conducted testing on SCBA equipment, reviewed several depositions of fact witnesses involved in the suit, and reviewed product literature and operating manuals regarding SCBA equipment, as well as some of Pro-Tech's test results, logs, and documents. He also attended portions of the trial in order to analyze the testimony of other witnesses.

Clearly, the trial court found that STOP was entitled to compensation for more than simply the time Mr. Held spent attending the trial. Based on the notable preparatory work and analysis done by Mr. Held and his time spent attending and testifying at the trial, we do not find an abuse of discretion in the trial court's assessment of his fee.

This assignment of error is without merit.

GENERAL DAMAGES AND DAMAGES FOR LOSS OF CONSORTIUM

In their assignment of error number two, plaintiffs contend that the $15,000.00 award in general damages to Mr. Bourque and the $3,000.00 award for loss of consortium to Mrs. Bourque were grossly inadequate.

In the assessment of damages, much discretion is afforded to the trier of fact. La. C.C. art. 2324.1, American Motorist Insurance Company v. American Rent-All, Inc., 579 So.2d 429, 433 (La. 1991). Recently, in Youn v. Maritime Overseas Corporation, 623 So.2d 1257, 1261 (La. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994), the Louisiana Supreme Court noted the following with regard to the assessment of general damages:

> [T]he discretion vested in the trier of fact is "great," and even vast, so that an appellate court should rarely disturb an award of general damages. Reasonable persons frequently disagree about the measure of general damages in a particular case. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award.

With regard to the general damage award of $15,000.00 for Mr. Bourque's physical and mental pain and suffering, the trial court stated:

Quantifying the plaintiff's damages for the physical, psychiatric, and emotion disorders occasioned by his H2S exposure is difficult. The ill feelings, nightmares, and emotional trauma are certainly compensable. The "discomfort" occasioned by the exposure was very real to Steven Bourque. However, the evidence, as noted earlier, shows that Steven Bourque had significant pre-existing problems. Discovering which were "symptoms" of the post-traumatic stress disorder, which were aggravated by the disorder, and which were merely pre-existing emotional problems which continued to manifest themselves, is very difficult. Understandably, the defendants emphasized his record of complaints to the Army

medical personnel during his rather brief and somewhat unsatisfactory military career.

Considering all of the evidence, the court is satisfied that the sum of $15,000.00 is a fair amount.

In the instant case, we cannot say that the award is below that which a reasonable trier of fact could assess for the effects of the particular injury to this particular plaintiff under the particular circumstances of this case. As such, we cannot say that the trial court abused its discretion in determining that Mr. Bourque's general damages did not exceed $15,000.00.

With regard to the $3,000.00 award made to Mrs. Bourque for loss of consortium, this court is likewise bound to uphold the award of the trial court absent an abuse of discretion. Mack v.

Transport Insurance Company, 577 So.2d 112, 119 (La. App. 1st Cir. 1991).

In explaining the award to Mrs. Bourque, the trial court stated:

> [Mr. Bourque's] disorder created a disruption of his relationship with Yvette Bourque. Although their relations were good at the time of trial, she experienced a loss of consortium during the months Steven Bourque was endeavoring to reshape his life following the accident.
>
> * * * *
>
> Mrs. Yvette Bourque's loss of consortium is difficult to evaluate. The evidence portrayed a somewhat "stormy" relationship which is apparently better (now that both have become active Christians) than the relationship was prior to the accident. His

> emotional condition prior to the accident was less than ideal. Nevertheless, during the months following the accident, he was more violent and difficult to live with than before. Thus, Mrs. Bourque is entitled to compensation for the "loss of consortium" she experienced while Steven was endeavoring to grapple with his stress disorder. The court, recognizing the difficulty of assessing value, awards $3,000.00 to Mrs. Bourque.

Mrs. Bourque testified at the trial that, prior to the accident, she and Mr. Bourque had a normal marriage wherein both worked during the week and engaged in family and recreational activities on the weekends when Mr. Bourque did not have to work. However, following the accident, Mr. Bourque exhibited increased signs of

irritability, memory loss, depression, and impatience which created much difficulty in the marital relationship. Approximately six months following the accident, the Bourques began an active involvement in church-related activities which has much improved their marriage.

A thorough reading of the record indicates that the trial court did not abuse its discretion in awarding $3,000.00 to Mrs. Bourque for loss of consortium.

This assignment of error is without merit.

ASSESSMENT OF MOODY COSTS

In their assignment of error number three, the plaintiffs contend that the trial court erred when it failed to assess against Aetna, the workers' compensation insurer of Mr. Bourque's employer, its proportionate share of the costs of recovery under the rationale of Moody v. Arabie, 498 So.2d 1081 (La. 1986). The

trial court stated in its reasons for judgment that the motion to tax costs against Aetna under Moody was denied because Mr. Bourque elected to draw benefits under the Longshoremen and Harbor Worker's Compensation Act (LHWCA). We find that the trial court judgment denying the motion to tax costs under Moody was correct.

Plaintiffs argue that federal law does not apply to Aetna's intervention, and thus Moody applies under Louisiana law because: 1) Mr. Bourque is not a covered employee under the LHWCA; and 2) he filed suit under Louisiana Workers' Compensation Law and has chosen since the trial to receive compensation payments under the Louisiana Workers' Compensation Law.

In Moody, the plaintiff received workers' compensation payments under the Louisiana Workers' Compensation Law, then filed suit against third persons for

damages and recovered. The employers' workers' compensation carrier intervened to recover for the workers' compensation benefits paid in the Moody case under the Louisiana Workers' Compensation Law. Therein lies the distinguishing factor between this case and Moody. In the case sub judice, Mr. Bourque applied for, and received, compensation payments under the LHWCA. He then filed suit under the Louisiana law. Therefore, although plaintiffs' suit is governed by Louisiana law, the employer's recovery in intervention for payments made to Mr. Bourque under the LHWCA is governed by federal law pursuant to the LHWCA. Federal law is clear that the compensation intervenor is entitled to full recovery of monies paid under the LHWCA without a reduction for its proportionate share of expenses and attorneys' fees. Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74,

100 S.Ct. 925, 63 L.Ed.2d 215 (1980); Bartholomew v. CNG Producing Co., 862 F.2d 555, 558 (5th Cir. 1989). See also Peters v. North River Insurance Co., 764 F.2d 306 (5th Cir. 1985).

Bloomer establishes that [under the LHWCA] the employer is entitled to recoup from a third-party recovery the entire amount of the benefits paid without a reduction for its proportionate share of the litigation expenses and attorneys' fees incurred by the worker. The compensation lien, however, attaches to the workers' net recovery. Kerr v. American Tugs of Venice, 522 So.2d 190, 194 (La. App. 5th Cir.) writ denied, 533 So.2d 372 (La. 1988).

We note that in its reply brief, Aetna assigned as error the final judgment which reduced its intervention recovery by the 20% of fault which was assessed to Mr. Bourque. However, Aetna neither appealed

the trial court judgment nor answered the appeal. We will not consider complaints contained in brief as we may not modify the judgment in Aetna's favor due to its failure to appeal or answer the appeal. La. C.C.P. art. 2133. Thomas v. Thomas, 552 So.2d 793, 794 n.1 (La. App. 1st Cir. 1989).

CONCLUSION

For the above reasons, the judgment of the trial court is affirmed in all respects. Costs of this appeal are to be borne equally by the appellants.

AFFIRMED.

THE SUPREME COURT OF THE

STATE OF LOUISIANA

YVETTE BOURQUE WIFE OF,

AND STEVE BOURQUE

VS. NO. 94-C-2738

SUN GAS CO., AND SAFETY

TECHNOLOGY AND OILFIELD

PROTECTORS, INC., ET AL

(ORYX ENERGY COMPANY,

THIRD PARTY PLAINTIFF

AND DEFENDANT-APPELLANT)

- - - - - -

IN RE: Oryx Energy Company; - Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of St. Mary 16th Judicial District Court Div. "E" Number 82,516; to the Court of Appeal, First Circuit, Number CA93 2213.

- - - - - -

January 13, 1995

Denied.

PFC

WFM

JLD

JCW

HTL

CDK

JPV

JOHNSON, J. not on panel.

Supreme Court of Louisiana

January 13, 1995

/s/ Frans J. LaBranche, Jr.

Clerk of Court

For the Court

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, DC 20543

William K. Suter
Clerk of the Court

Area Code 202
479-3011

March 30, 1995

Mr. Dennis Stevens
P. O. Drawer 13910
New Iberia, LA 70562-3910

Re: Oryx Energy Company, fna Sun Gas Company, Inc.
v. Yvette Burque(sic), et vir
Application No. A-721

Dear Mr. Stevens:

The application for an extension of time within which to file a petition for a

writ of certiorari in the above-entitled case has been presented to Justice Scalia, who on March 30, 1995, extended the time to and including June 12, 1995.

This letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K. SUTER, Clerk
By /s/ Loretta S. Ruffin
Loretta S. Ruffin
Assistant Clerk

NOTIFICATION LIST

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